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No. 90-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 5, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Is "discrimination" an essential element of an employee's duty of fair representation claim against the labor organization that is his exclusive representative under § 9(a) of the National Labor Relations Act (Act), where the employee was terminated from employment because the exclusive representative did not fulfill its mandatory duty to file the notice of strike required by § 8(d) of the Act?

2. Is a *per se* violation of the duty of fair representation established where an employee is terminated from employment because the labor organization that is his exclusive representative under § 9(a) of the National Labor Relations Act (Act) did not fulfill its mandatory duty to file the notice of strike required by § 8(d) of the Act?

3. Is a *per se* violation of the duty of fair representation established where the labor organization that is the employees' exclusive representative under § 9(a) of the National Labor Relations Act (Act) failed to advise them that it had *not* fulfilled its mandatory duty to file the notice of strike required by § 8(d) of the Act prior to the employees' vote on whether to ratify their employer's bargaining proposal or engage in a strike, and, as a result, those employees are terminated from employment?

PARTIES TO THE PROCEEDING BELOW

The parties named in the caption in this Court are the parties to the proceeding below, namely:

Petitioner: Pete Le'Mon.

Respondent: National Labor Relations Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

This case originated with charges the petitioner, Pete Le'Mon, filed with the National Labor Relations Board (NLRB) through its Regional Office in Phoenix, Arizona. The NLRB Regional Director issued a complaint which was heard before an Administrative Law Judge (ALJ). The ALJ issued a recommended decision and order. The ALJ's recommended decision was reviewed by a panel of the NLRB, which issued a decision. The NLRB's decision was reviewed by the United States Court of Appeals for the Tenth Circuit. This process resulted in the following decisions:

The ALJ's recommended decision and order is dated March 4, 1987, is officially reported at 291 N.L.R.B. No. 41, and is reprinted in the Appendix (App. __) at 23a.

The NLRB's decision and order is dated September 30, 1988, is officially reported at 291 N.L.R.B. No. 41, unofficially reported at 131 L.R.R.M. 1199, and is reprinted at App. 14a.

The decision of the United States Court of Appeals for the Tenth Circuit is officially reported at 902 F.2d 810 (1990), is unofficially reported at 134 L.R.R.M. 2209, and is reprinted at App. 3a.

JURISDICTION

The decision of the United States Circuit Court for the Tenth Circuit was filed May 7, 1990. No request for rehearing was made. However, on August 3, 1990, the petitioner in this Court filed an Application for an Extension of Time Within Which to File a Petition for Certiorari. That Application was granted by the Court, through Associate Justice Byron R. White, by Order No. A-101, dated August 6, 1990. That Order extended the time for filing a petition for certiorari "to and including September 5, 1990." This Court, therefore, has jurisdiction over the instant petition under 28 U.S.C.A. § 1254(l) (West 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments to the Constitution of the United States are relevant to this case. In addition, §§ 7, 8(b)(l)(A), 8(d), and 9(a) of the National Labor Relations Act, respectively 29 U.S.C.A. §§ 157, 158(b)(l)(A), 158(d), and 159(a) (West 1990), are germane to this Court's consideration of the case. All relevant constitutional and statutory provisions are reprinted verbatim and in order, beginning at App. 48a.

STATEMENT OF THE CASE

Material Facts

Petitioner Pete Le'Mon (Le'Mon) was employed by Aztech International, Inc. (Aztech), as a silkscreen paint specialist, until October of 1985. His employment was within a bargaining unit of employees represented by Sheet Metal Workers' International Association Local No. 49 (SMW). SMW was the exclusive representative of unit employees, including Le'Mon, under authority of § 9(a) of the NLRA,[1] for purposes of collective bargaining, contract administration, and grievance adjustment with Aztech on the employees' behalf.

The Aztech/SMW collective bargaining agreement covering unit employees was due to expire on September 30, 1985. In the late Summer of 1985, SMW conducted a strike vote among the Aztech employees it represented. The membership authorized a strike to be conducted. On September 29, 1985, SMW had received Aztech's "final offer," and held a membership vote to accept or reject the bargaining agreement proposed by Aztech. The membership voted to reject Aztech's offer.[2]

A strike ensued on October 1, and effectively ended on October 5, 1985, when employees learned through newspaper accounts or letters from Aztech that the strike was "illegal." Thereafter, Aztech would only take the striking former employees back to employment as "new hires."

SMW concedes that the strike was illegal, and that it had *not* filed with the Federal Mediation and Conciliation Service

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[1] 29 U.S.C.A. 159(a) (West 1990).

[2] There is a factual dispute, irrelevant to this petition, as to the exact date within this period that the strike was authorized by SMW membership, as well as to whether the authorization was unanimous or not.

(FMCS) the strike notice mandated by § 8(d) of the NLRA.[3] The record before the ALJ explicitly shows SMW's *admission* that, "service of [the required] notice on the F[ederal] M[ediation] and C[onciliation] S[ervice] was given by lawyer (inaudible) September 11, 1985, which was received by the FMCS on September 17, 1985."[4] It shows SMW's additional *admission* that the notice "did *not* comply with the thirty-day time period required for notice of the existence of the dispute as set forth in Section [8(d)(3)] of the [NLRA]."[5] And the record contains SMW's further *admission* that "its conduct [of the strike] began in less than thirty days after service of the notice on FMCS."[6] As SMW's lawyer put it: "Yeah, well, obviously I'm stuck with the fact that we gave the notice on the 11th, it was received on the 17th by the Service, a strike commenced on October 1. Now, I'm not going to deny any of those facts . . . that's obvious."[7] Thus, the strike was begun a full nineteen days before one was permitted under § 8(d) of the Act.

Even more fundamentally to this Court's review of the issues in this case, the record below shows that SMW *never* advised the Aztech employees at the meetings held in September of 1985 that the notice required by § 8(d) had *not* been timely filed. According to SMW records, meetings were held on September 18, 26, and 30.[8] The September 30, 1985, meeting was crucial, as it was held "[t]o accept or reject the contract."[9] Thus, in voting on

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[3]29 U.S.C.A. § 158(d) (West 1990).

[4]Transcript (Tr.__) of proceedings before the ALJ, October 21, 1986, at 8.

[5]Tr. 9 (emphasis added).

[6]*Id.*

[7]Tr. 17.

[8]Tr. 243.

[9]Tr. 244.

September 30, the employees were denied the vital piece of information that SMW had not timely filed the notice which was a mandatory precondition to a lawful strike. As the ALJ so sensitively put it, despite his harsh decision described below, "I'm sorry that it caused such pain for the employees, who found themselves hooked by the language of Section 8-D, which deprived them of employment status."[10]

Litigation History

On October 29, 1985, Le'Mon filed charges with the NLRB's Regional Office in Phoenix. He alleged that SMW violated § 8(b)(1)(A) of the NLRA because, *inter alia*, it did not advise the Aztech employees it represented that SMW had not timely filed the § 8(d) notice. The Regional Director issued a complaint on those charges on April 21, 1986.[11]

The issues raised by the Regional Director's complaint were presented to James M. Kennedy, ALJ, on October 21, 1986. ALJ Kennedy issued his decision on March 4, 1987.[12] ALJ Kennedy first identified two separate standards for duty-of-fair-representation (DFR) violations. First, he concluded that SMW's duty "was not a fiduciary one, for the Supreme Court and the Board have both held that the relationship requires only that the statutory representative provide equal protection to the employees it represents."[13] On the other hand, ALJ Kennedy also concluded that "[a]s a result of *Vaca* [*v. Sipes*, 386 U.S. 171 (1967)] the duty of fair representation is now often described as one in which a union may not act arbitrarily, invidiously, irrelevantly, unfairly or perfunctorily in carrying out its representational

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[10]Tr. 255.

[11]App. 42a.

[12]App. 23a.

[13]App. 32a.

duties."[14] He acknowledged that "the duty itself remains somewhat murky depending on the fact pattern being presented."[15] After finding that "if the [SMW's] duty is that of a fiduciary, it failed to meet it[,]" ALJ Kennedy ultimately found no violation in this case because, "only those [acts] which have been *motivated by* hostile, invidious, irrelevant, or unfair considerations [result in a DFR violation]."[16]

The NLRB affirmed in a decision and order dated September 30, 1988.[17] The NLRB found that SMW's "deficiencies in representing the employees amounted to no more than mere negligence."[18] The NLRB admonished that "[t]he representation that the [SMW] provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed."[19] Despite the fact that SMW failed to meet "the standards of competence and caution" the NLRB would otherwise have liked, the NLRB found no violation of § 8(b)(1)(A) because "[a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary,

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[14]App. 33a.

[15]App. 34a.

[16]App. 39a (citing cases) (emphasis added). Also, at App. 39a n.7, it is noted that, "[t]he Board has imposed a fiduciary obligation on unions in the enforcement of union security clauses." (Also citing cases.)

[17]App. 14a.

[18]App. 15a. The NLRB panel agreed on this point. It split 2-1 over whether SMW's treatment of employees, on or after October 2, 1985, was a further violation of the DFR. As Le'Mon's instant petition concerns only SMW's pre-October 2d DFR violations, we do not discuss the aspects of the case over which the NLRB members disagreed.

[19]App. 17a.

discriminatory, or in bad faith.'"[20] The NLRB did not "consider the conduct here to have been arbitrary."[21] As a caveat, the NLRB "assume[d], arguendo, that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation."[22] Remarkably, the NLRB suggested that the employees' only recourse for past DFR violations is to "boot the rascals out," and not compensation for the losses resulting from those violations.[23]

Le'Mon filed a petition for review of the NLRB's decision with the United States Court of Appeals for the Tenth Circuit.[24] The Tenth Circuit affirmed the NLRB in a decision filed May 7, 1990.[25] Judgment was entered thereon on that same date.[26] In its decision, the Court noted that, "[b]oth *Vaca* and *Foust I* involved a union's handling of an *individual* union member's grievance, while in the present case the union's negligent conduct affected *all* its members."[27] Distinguishing

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[20] *Id.*

[21] *Id.*

[22] *Id.* at n.5.

[23] The NLRB said: "Respondent's deficiency in representation is a matter for employees to consider in selecting and supporting their representative, not a matter correctable under Section 8(b)(1)(A) of the Act." App. 17a-18a.

[24] The Court had jurisdiction over Le'Mon's petition for review, as he is a "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," under § 10(f) of the NLRA, 29 U.S.C.A. § 160(f) (West 1990).

[25] App. 3a.

[26] App. 1a.

[27] App. 8a. *Vaca* refers to Vaca v. Sipes, 386 U.S. 171 (1967). *Foust I* refers to Foust v. Electrical Workers, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979) (emphasis in original text).

those cases from Le'Mon's, the Court said, "[u]nlike these Supreme Court cases and unlike *Foust I*, the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of employees represented by the Union."[28] On that basis, the Court "decline[d] to extend the duty to situations in which the injury suffered is common to the majority of represented employees."[29] Like the NLRB, the Court eschewed any relief for employees in Le'Mon's situation, saying, with complete disregard for the facts, "the Aztech employees had a remedy against the Union for the harm caused by the Union's negligence and they used that remedy: they petitioned for an election to oust the Union as the exclusive bargaining representative."[30]

REASONS FOR ALLOWANCE OF THE WRIT

The Decision Below Is Contrary to This Court's DFR Precedents

American labor statutes, including the NLRA, enact a policy which, "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[31] This policy "subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit."[32] Therefore, to protect employees from the

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[28] App. 10a.

[29] App. 13a.

[30] App. 10a-11a. Of course, the Court did not, and could not, explain how ousting the SMW restores the employees' economic losses resulting from its DFR violation.

[31] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

[32] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

statutory exclusive representative's misuse of this extraordinary power over their working lives, this Court created the DFR to provide employees with the means to obtain redress for wrongs committed by the exclusive representative.

The DFR was first applied by this Court in *Steele* to labor organizations granted powers as exclusive representatives under the Railway Labor Act.[33] The *Steele* rule is that, to avoid liability for a DFR violation, the exclusive representative must act "without hostile discrimination, fairly, impartially, and in good faith."[34] Subsequently, decisions of the Court have applied the DFR with equal force to exclusive representatives under the NLRA.[35] The *Vaca* statement of the rule closely follows *Steele* in providing that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[36] Employees claiming breach of the DFR can sue in court[37] or, as Le'Mon did in this case, file an unfair labor practice charge with the NLRB.[38]

The DFR serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress

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[33]Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[34]*Id.* at 204.

[35]Vaca v. Sipes, 386 U.S. 171 (1967).

[36]*Id.* at 190.

[37]Communications Workers v. Beck, 487 U.S. 735, 743 (1988).

[38]Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). The Second Circuit in NLRB v. Teamsters Local 282, 740 F.2d 141 (1984) concluded that violations of the DFR violate § 8(b)(l)(A) of the NLRA.

by the provisions of federal labor law."[39] The DFR is "primarily and jealously guarded by the judiciary."[40] The DFR is "highly fiduciary."[41] It "can be analogized to an agent's fiduciary responsibility to his principal, which entails special duties of care and loyalty."[42] The DFR was created for the basic reason that "[t]he constitutional problem inherent [in exclusive representation] is clear."[43] Without the DFR, the major operational premise of our labor laws, exclusive representation, would be invalidated on constitutional grounds.[44]

Based upon these authorities the decision of the Tenth Circuit below is contrary to principles of DFR jurisprudence that provide employees with a "bulwark" against, or at least relief for, untoward actions by their exclusive representatives.

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[39] *Vaca*, 386 U.S. at 182.

[40] Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853, 857 (8th Cir. 1975).

[41] National Maritime Union v. Herzog, 78 F. Supp. 146, 172 (D.D.C.), *aff'd*, 334 U.S. 854 (1948). This Court adopted the "trust analogy" to describe an exclusive representative's DFR obligations in Teamsters Local 391 v. Terry, ___ U.S. ___, 110 S. Ct. 1339 (1990).

[42] Grant v. Mulvihill Bros. Motor Serv., Inc., 428 F. Supp. 45, 46 (N.D. Ill. 1976).

[43] *Steele*, 323 U.S. at 208 (Murphy, J., concurring).

[44] "[I]t cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." *Id.*

NLRB Decisions Are in Irreconcilable Conflict

SMW admitted that it did not file the required § 8(d) notice.[45] The obligation to file the notice is upon a "party" to the expiring collective bargaining agreement, *i.e.*, the employer or the exclusive representative.[46] Thus, Le'Mon and the other employees had no authority under § 8(d) to file the required notice, even if they had known of the requirements of the Act. SMW's admission that it did not file the required notice was accepted by ALJ Kennedy, the NLRB, and the Tenth Circuit. Yet none of those forums imposed liability on SMW for its acknowledged failure. In the final analysis, it was concluded that the failure to fulfill this *mandatory* duty was not "arbitrary"[47]

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[45]The filing of a § 8(d) notice "is a key ingredient in the national policy of promoting industrial peace through collective bargaining." Communications Workers Local 1104 v. NLRB, 520 F.2d 411, 415 n.4 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

[46]SMW sought to defend this case on the basis that its attorney failed to file the § 8(d) notice, and that the SMW, itself, did not. And SMW sought to characterize its attorney's actions as "negligence," so as to avoid liability. We do not explore these spurious defenses further, as the record here will not permit us to do so. The reasons the attorney did not file the § 8(d) notice *do not* appear anywhere in the record in this case. More fundamentally, we know of no doctrine, under the DFR or otherwise, that permits one to delegate performance of a mandatory duty, and then defend the agent's failure to perform on the basis that it was only "negligent." And, we know of no doctrine, in any context, that negligence is a defense to nonperformance of a mandatory duty, as SMW claims here, for its grossly late filing of the § 8(d) notice. To the contrary, under generally understood principles, SMW was a guarantor of the timely filing of the § 8(d) notice. In similar circumstances, at least one court has concluded that "the union should be responsible for a total failure to act that is unexplained and unexcused." Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1273 (9th Cir. 1983).

[47]The NLRB and the Tenth Circuit artificially diminished the gravity of the SMW's abject failure to file the § 8(d) notice by noting that the SMW had asked

[continued]

and did not "discriminate" among individuals or groups of the represented employees.

That decision conflicts with a prior decision of the NLRB, which, like the NLRB decision here, received Circuit Court enforcement. The earlier decision is *Teamsters Local 860* (*Local 860*).[48] In *Local 860*, the exclusive representative learned during bargaining that the employer threatened to discharge bargaining unit employees in a certain craft if the negotiated agreement required it to pay a certain wage level. That wage level became the negotiated wage, and the employer discharged the affected employees. The NLRB concluded that the representative's failure to advise employees of the employer's threat to their livelihoods constitutes a breach of the DFR and a violation of § 8(b)(l)(A) of the Act. In *Le'Mon*, the NLRB made no attempt to distinguish *Local 860*, and, in fact, did not even mention the earlier decision.

In pertinent parts, the NLRB decisions in *Local 860* and *Le'Mon* conflict as follows:

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its attorney to file it, and that union officials claimed they did not know the notice was not timely filed until after the strike had begun. We know of no doctrine that immunizes the failure to perform a mandatory duty by delegating responsibility to others, then pointing to their default.

[48] 236 NLRB 844, *enforced*, 652 F.2d 1022 (D.C. Cir. 1981).

Local 860

"Yet, all three union representatives knew that [Local 860's negotiator] insisted upon those increases because of insistence by the clerical employees. Commonsense, as well as the requirements of proper representation, required that at least one of the representatives fully advise the employees that their insistence was jeopardizing their jobs. Whether or not the employees would continue with the same demands if they knew of possible consequences is immaterial. Since the demand was theirs, it was incumbent upon Respondent to keep them advised and to leave to them the choice of retrenching or standing firm. *By allowing events to follow their course, and permitting the clericals to lose their jobs without knowing the weakness of their position, Respondent violated its fiduciary duty to its members. Respondent's motive in acting as it did*, to which General Counsel devoted much of its brief, *is immaterial.*"[49]

Le Mon

"I think it is fair to conclude that if the Union's duty is that of a fiduciary, it failed to meet it. However, I have already noted that the fiduciary duty does not exist here. Moreover, the Board has not accepted the Ninth Circuit's approach here. In fact the Board has held '. . .it is not every act of disparate treatment or negligent conduct which is proscribed by Section 8(b)(1)(A), only those which have been motivated by hostile, invidious, irrelevant, or unfair considerations, . . .' *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982 (1978). Thus, while we may be offended by Respondent's failure to file the FMCS notice and its consequent negative impact upon the employment status of the individuals Respondent represented, it appears that under current Board law the Respondent did not breach the duty of fair representation when it called the strike."[50]

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[49]ALJ Decision, 236 N.L.R.B. at 851 (emphasis added).

[50]ALJ Decision, App. 39a (notes omitted).

Local 860	Le'Mon
"In adopting the conclusion that Respondent violated Sec. 8(b)(1)(A) of the Act we rely on the finding that Respondent failed to represent every employee in the unit fairly, impartially, and in good faith by persisting in demanding a wage increase it knew would result in their termination. See *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192, 203 (1944). We note that it did not advise the clericals their wage demand was jeopardizing their jobs while insisting that it was prompted by the unit's demand for the increase."[51]	"The representation that the Respondent provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed. It does not, however, violate Section 8(b)(1)(A). A breach of duty of fair representation occurs only when the representative's conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). We do not consider the conduct here to have been arbitrary, and the Respondent's deficiency in representation is a matter for employees to consider in selecting and supporting their representative, not a matter correctable under Section 8(b)(1)(A) of the Act."[52]

Circuit Court Decisions Are in Irreconcilable Conflict

The Decisions of the District of Columbia Circuit, in *Local 860* and the Tenth Circuit, in *Le'Mon*, are in irreconcilable conflict, as follows:

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[51]NLRB Decision, 236 N.L.R.B. 844 n. 2.

[52]NLRB Decision, App. 17a-18a.

Local 860	Le'Mon
"Under the facts and circumstances presented in this proceeding, we find that the Union had a duty to inform its membership of management's position so that they, in turn, could make an informed reassessment of their wage demand. The Union's failure to apprise the clericals of the ultimate danger and risk of job loss created by their wage demand was clearly an arbitrary action and constituted a breach of duty. The NLRB's finding of a violation of the Act should not be disturbed."[53]	"Because the concerns which prompted the Supreme Court to develop a duty of fair representation are not present in this case, we decline to extend the duty to situations in which the injury suffered is common to the majority of represented employees."[54]

Decisions of Other Circuits Are in Irreconcilable Conflict on DFR Standards in General

Decisions of other Circuit Courts of the United States are also in general conflict with regard to the standards that apply to DFR cases. In the Fifth Circuit, the rule is, "[a] breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts."[55]

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[53]Teamsters Local 860 v. NLRB, 652 F.2d at 1025 (D.C. Cir. 1981).

[54]Tenth Circuit Decision in *Le'Mon*, App. 13a.

[55]O'Neill v. Air Line Pilots Ass'n, 886 F.2d 1438, 1444 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3630 (Mar. 23, 1990) (No. 89-1493) (citing cases).

The Seventh Circuit recognizes that it "is the only circuit to require proof of intentional misconduct [to establish a DFR violation.]"[56] The conflict among the Circuits in applying this Court's precedents is irreconcilable, extending from an intentional misconduct requirement, on the one hand, to an arbitrariness or nonrationality standard on the other. Under these authorities, Le'Mon could have prevailed in the District of Columbia and Fifth Circuits, but not in the Tenth or Seventh Circuits.

Decisions of Circuit Courts Are in Irreconcilable Conflict as to Whether Proof of "Discrimination" Is an Essential Element of a DFR Claim

As noted above, the Tenth Circuit, in *Le'Mon*, requires proof of "discrimination" as an essential element to a successful DFR claim. The Eighth Circuit, however, holds that the exclusive representative's duty not to discriminate is a "strict supplementary duty of fair representation" which applies where "a minority group within the coalition [has] interests adverse to the majority."[57] In the Eighth Circuit's view, then, this "supplementary [DFR] duty" applies only where the bargaining unit members have divided and conflicting interests. That Circuit does not hold, as does the Tenth Circuit, that without "discrimination" the exclusive representative can commit no wrong, so long as the harms it creates befall all bargaining unit employees equally. In that respect, the Eighth Circuit seems to be in agreement with the First Circuit, in *Alicea v. Suffield Poultry*.[58] In *Alicea*, the court would impose liability if a "misrepresentation was either an arbitrary or bad faith abandonment of [the DFR] obligation to

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[56]Thomas v. United Parcel Serv., 890 F.2d 909, 922 n.5 (7th Cir. 1989).

[57]Beardsly v. Chicago & North Western Transp. Co., 850 F. 2d 1255, 1266 (8th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1340 (1989).

[58]902 F.2d 125 (1st Cir. 1990).

protect the interests of *all* those whom the Union represents."[59] Under these authorities, Le'Mon would have prevailed in the Eighth and First Circuits, but not in the Tenth Circuit.

Those Circuits that impose a "discrimination" element to a DFR violation ignore the language of *Steele* that, "the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy *or* discriminate against the rights of those for whom it legislates *and* which is *also* under an affirmative constitutional duty equally to protect those rights."[60] Rather, they misapply the language of *Huffman*[61] which states that the exclusive representatives' "statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any."[62] Those courts mistake *Huffman* as substituting a limited "discrimination" requirement for the broader *Steele* principle. This, of course, is error, for this Court has repeatedly reaffirmed *Steele* without qualification.[63]

The state of judicial confusion represented by these decisions is highlighted by a panel decision in the Seventh Circuit in *Olsen v. United Parcel Service*.[64] In *Olsen*, the panel states the DFR rule as follows:

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[59] *Id.* at 133 (emphasis in original text).

[60] *Steele*, 323 U.S. at 198 (emphasis added).

[61] Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[62] *Id.* at 337.

[63] *See* DelCostello v. Teamsters, 462 U.S. 151, 164 n.14 (1983).

[64] 892 F.2d 1290 (7th Cir. 1990).

> Given the fact that a union must seek to promote the good of its employees *as a group* in the negotiation context, and that many of the individual interests may conflict, the union must be permitted to exercise broad discretion in its negotiative capacity. The union meets its duty of fair representation at this stage by exercising its judgment in a manner that is not patently unreasonable. * * * So long as the union does not intentionally harm a member or class of members, it will be deemed to have represented its members fairly.[65]

This statement of the rule is in conflict with itself, for "patently unreasonable" judgments can be made without causing "intentional[ ] harm [to] a member or class of members" only.[66]

Decisions of Circuit Courts Are in Irreconcilable Conflict Over Whether Nondisclosure of Information Is a DFR Breach

As noted above, the District of Columbia Circuit in *Local 860* imposed DFR liability on an exclusive representative for failing to disclose to bargaining unit employees that their employment was jeopardized by continued insistence on a certain wage level in a negotiated agreement. The Tenth Circuit in *Le'Mon* found no such DFR obligation. The First Circuit concluded that, "[h]olding a union responsible for serious misrepresentations that lack rational justification or are improperly motivated is consistent with the union's obligation to deal honestly and fairly with its members."[67] The Seventh Circuit would impose DFR liability

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[65] *Id.* at 1294 (emphasis added).

[66] The *Olsen* panel, *id.* at 1295, went on to distinguish various DFR duties the exclusive representative owes in negotiating and administering a collective bargaining agreement. As *Le'Mon* concerns the SMW's negotiating role, we do not discuss the contract administration aspects of *Olsen*.

[67] *Alicea*, *supra* note 58, at 130.

for nondisclosure of information to represented employees only where "the union representative had privileged access to company information not available to the general membership."[68] But, the Second Circuit has identified the general DFR standard as, "the duty of fair representation *and disclosure*."[69]

CONCLUSION

The writ of certiorari requested should be granted in order that this Court can resolve the conflicts among the Circuits regarding the proofs employees must make to recover for violations of the DFR.

The DFR "rule" below, that the exclusive representative is not required to provide the fiduciary representation of a trustee, under *Terry*, or even *fair* representation, under *Steele*, but can provide *no representation at all*, so long as no representation is provided on a "nondiscriminatory" basis, eviscerates the DFR standards imposed by this Court to save exclusive representation from invalidation on constitutional grounds. Thus, the rule below nullifies this Court's precedents by requiring employee victims of DFR violations to prove discrimination in addition to the already substantial proof requirements of such cases.

And while we would urge the Court to clarify DFR law, in general, it is most fundamentally important that the Court decide: (1) whether it is a *per se* violation of the DFR for an exclusive representative to fail to fulfill the mandatory duty to file a § 8(d)

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[68]Swatts v. United Steelworkers, 808 F.2d 1221, 1224 (7th Cir. 1986). In so stating, the *Swatts* court was distinguishing *Local 860*. As SMW's failure to file the § 8(d) notice was information to which the leadership had "privileged access" and the "information [was] not available to the general membership," the *Swatts* distinction does not apply here.

[69]Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n, 1990 WL 98638 at 15, *to be reported at* 909 F.2d 48 (2d Cir. 1990) (emphasis added).

notice, and further to fail to advise represented employees that it has not filed the notice; and (2) whether an exclusive representative can be found to violate the DFR where its conduct is "arbitrary, discriminatory, or in bad faith" but no intentional discrimination is also shown.

Respectfully submitted,

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September 5, 1990

APPENDICES

APPENDIX A

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

May 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETE LE'MON,	)	
	)	
Petitioner,	)	
	)	No. 88-2833
v.	)	(N.L.R.B. No. 28-CB-2479)
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

JUDGMENT
Entered May 7, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY*, District Judge.

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* Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

This cause came on to be heard upon petition for review of an order of the National Labor Relations Board. The matter was heard on the administrative record of the National Labor Relations Board and was argued by counsel.

Upon consideration whereof, it is ordered that the order of the National Labor Relations Board is affirmed. Accordingly, the petition for review is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher
Chief Deputy Clerk

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMING THE ORDER OF THE NLRB

May 7, 1990

FILED
United States Court of Appeals
Tenth Circuit
MAY 7 1990

ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PETE LE'MON, Petitioner,	)	
v.	)	No. 88-2833
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

ON PETITION FOR REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
(No. 28-CB-2479)

Dan A. McKinnon, III, of Marron, McKinnon & Ewing, Albuquerque, New Mexico, for Petitioner.

Fred L. Cornnell, Attorney (Rosemary M. Collyer, General Counsel; Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel; and Barbara A. Atkin, Supervisory Attorney, with him on the brief), National Labor Relations Board, Washington, D.C., for Respondent.

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY,* District Judge.

SEYMOUR, Circuit Judge.

Pete Le'Mon, one of the employees represented by Sheet Metal Workers' International Association, Local Union No. 49 (Union), argues that the Union's failure to give the Federal Mediation and Conciliation Service (FMCS) timely notice of a labor dispute and the Union's subsequent encouragement of the illegal strike breached the Union's duty of fair representation, thereby constituting an unfair labor practice under section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1982) (NLRA). The National Labor Relations Board (NLRB) held that the Union did not commit an unfair labor practice. Le'Mon appeals, and we affirm.

I.

Aztech International, Ltd., is an Albuquerque company that manufactures low temperature electric radiant heating panels and multi-stage indirect/direct evaporative cooling units. All of Aztech's thirty-five production employees were covered by a collective bargaining agreement entered into on October 8, 1981, and effective until September 30, 1985. For several months prior

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*The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

to the contract's termination, the Union engaged in negotiations with Aztech for a new agreement. At the same time, the Union conducted monthly meetings with the employees to discuss the status of the contract talks.

On July 30, 1985, sixty days prior to the expiration of the collective bargaining agreement, the employees voted unanimously (with a few abstentions) to authorize the Union to call a strike should the contract negotiations fail. On September 30, the Union met with the employees to discuss Aztech's final contract offer. Gary Briggs, the Union's business manager, presented the offer and expressed his displeasure with the failure to ban or limit subcontracting by Aztech, the random drug-testing clause, and the lack of wage increases. When asked by an employee whether he would sign this contract, Briggs responded that he would not. Briggs told the employees that their other option was to strike, but that by striking they risked being replaced. According to Briggs, being replaced was no different than being fired. The employees voted by secret ballot to reject Aztech's offer and the next day, October 1, they went on strike and began picketing.

The day the strike began, all the employees received a letter from Aztech's president, Bennett King, which stated that the Union's failure to give timely notice to the FMCS made the strike illegal, that all striking employees therefore were not protected by the NLRA from being fired, and that all striking employees were fired, effective immediately. King then offered to rehire the strikers as new employees if they filled out an application and underwent the standard interview and screening process. In addition to the letter, Aztech also filed an unfair labor practice charge against the Union.

Under section 8(d)(3) of the NLRA, 29 U.S.C. § 158(d)(3) (1982), the party desiring termination or modification of the collective bargaining agreement (here the Union) is required to give the FMCS notice of an impending labor dispute within thirty days of notifying the other party of its wish to terminate or

modify.[1] The Union concedes that it failed to meet this requirement because the letter mailed by the Union's attorney, Gerald Bloomfield, was dated September 11 and was received by the FMCS on September 17, well outside of the thirty-day deadline. Neither Briggs nor the Union's business representative, George Gilliland, was aware of this late notice.

Briggs and Gilliland learned of Aztech's contention that the strike was illegal, but initially they did not believe the allegation and were unable to confer with the Union attorney because he was out of town. When asked about Aztech's letter, the Union officials told the strikers that the company was simply trying to scare them and that the letter was a ploy to break up the strike. Briggs encouraged the strikers to stick together; if they maintained solidarity, he said, chances were good that the economic pressure would force Aztech to accede to the Union's demands and the strikers would regain their jobs. Briggs continued to urge the strikers to "stick together," even after the NLRB's Regional Office issued a complaint against the Union and after a newspaper printed a story on the illegality of the strike. By October 7, however, the strike was obviously disintegrating, and Briggs told the employees still out on strike that they should attempt to go back to work.

After the failure of the strike, the employees, upset with the Union's handling of the labor dispute, filed a decertification petition under section 9(c) of the NLRA, 29 U.S.C. § 159(c) (1982), in which they sought an election to oust the Union as the exclusive bargaining representative. When the Union received

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[1] The purpose of the notice requirement is to "provide for a waiting period during which there can be no strike" and to enable the FMCS to try "to bring about a peaceful settlement." Procter & Gamble Indep. Union v. Procter & Gamble Mfg., 312 F.2d 181, 188 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963); see also R. Gorman, Labor Law 425 (1976) ("it was clearly the intention of Congress to have the mediation agencies notified and given an opportunity to intervene in the bargaining prior to the use of economic weapons").

the petition, it disclaimed interest in representing Aztech's production employees.

II.

Le'Mon's principal argument is that the Union breached its duty of fair representation by failing to give notice of a labor dispute to the FMCS within the prescribed time period and by encouraging the Aztech workers to continue with the illegal strike. Before considering Le'Mon's arguments, we note that the appropriate standard of review in labor cases requires that we must affirm the Board's decision if its findings are supported by substantial evidence on the record and if it correctly interpreted and applied the law. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Central Soya Co. v. NLRB, 867 F.2d 1245, 1247 (10th Cir. 1988); NLRB v. Carbonex Coal Co., 679 F.2d 200, 203 (10th Cir. 1982).

Le'Mon relies primarily on our decision in Foust v. International Brotherhood of Electrical Workers, 572 F.2d 710 (10th Cir. 1978) ("Foust I"), rev'd on other grounds, 442 U.S. 42 (1979) ("Foust II"), to support his argument that a breach of the duty of fair representation occurred. Foust I involved a radioman employed by the Union Pacific Railroad Company. The Union Pacific dismissed Foust following an on-the-job injury, and his attorney wrote to the appropriate officer of the union to get the discharge decision reversed. We stated that the union failed "to pursue the claim in question despite the fact that it had full knowledge of the 60-day limit [for filing the grievance]." Foust I, 572 F.2d at 716 (emphasis added). We noted that the union had delayed unnecessarily, sending letters back and forth between various union officials and insisting that "despite the shortness of time, . . . Foust personally submit the claim to them." Id. Accordingly, we upheld the court's jury charge as a proper statement of the applicable law and affirmed the jury's determination that the union had breached its duty of fair representation.

As the Supreme Court has held, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967); see also Foust II, 442 U.S. at 47; Woods v. North Am. Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973); Reid v. International Union, United Auto. Workers, 479 F.2d 517, 520 (10th Cir.), cert. denied, 414 U.S. 1076 (1973). Such conduct includes, for example, situations in which a union "arbitrarily ignore[s] a meritorious grievance or process[es] it in perfunctory fashion." Vaca, 386 U.S. at 191. We held in Foust I that the union's handling of the grievance was done in a perfunctory manner, and Le'Mon urges us to find that the failure of the Sheet Metal Workers' Union to give the FMCS timely notice was done in a similarly "perfunctory fashion."

Both Vaca and Foust I involved a union's handling of an individual union member's grievance, while in the present case the union's negligent conduct affected all its members. This distinction is a significant one, as an analysis of the duty of fair representation reveals, and is one that precludes recovery in the instant case.

The duty of fair representation, a duty which predates the prohibition on union unfair labor practices in the 1947 amendments to the NLRA, is a statutory obligation that "has 'judicially evolved' as part of federal labor law." Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 432 (1989) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971)). The Supreme Court first recognized the duty in a Railway Labor Act case. See Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944). In Steele, the Railroad had removed five black firefighters, previously assigned to a highly desirable "passenger pool," and replaced them with white firefighters. The Railroad was acting pursuant to a new collective bargaining agreement it had negotiated with its employees' bargaining representative, the Brotherhood of Locomotive Firemen and Enginemen. This union, which by its constitution excluded all blacks from membership, had initiated the

negotiations because it "desire[d] to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service." Id. at 195. The resulting racially discriminatory agreement formed the basis of the suit against the union and the Railroad.

In analyzing the black firefighters' claim, the Supreme Court acknowledged the statutory right of the majority of any craft to choose its representative responsible for collective bargaining with the employer. But the Court rejected the argument that Congress therefore "intend[ed] to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." Id. at 199. If the union did not owe some duty to represent the minority, the Court reasoned, then minority members "would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursing the occupation in which they are employed." Id. at 201. The Court held that "[s]o long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft . . . without hostile discrimination, fairly, impartially, and in good faith." Id. at 204.[2]

As the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights, whether in collective bargaining or in the handling of grievances, has been emphasized consistently. See Vaca, 386 U.S. at 182 ("the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor

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2 Although Steele was a Railway Labor Act case, the Supreme Court later held that the duty of fair representation applied equally to National Labor Relations Act cases. See Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); see also Vaca, 386 U.S. at 177; Foust II, 442 U.S. at 46 n.8. Foust I also arose under the Railway Labor Act.

law") (emphasis added); Breininger, 110 S. Ct. at 432 (the duty "is an essential means of enforcing fully the important principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the majority of his [or her] coworkers' " (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971))) (emphasis added); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 n.14 (1983) (the duty exists to ensure that "individual employees are not . . . deprived of all effective means of protecting their own interests") (emphasis added); Foust II, 442 U.S. at 46-47; Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

Unlike these Supreme Court cases and unlike Foust I, the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of Aztech employees represented by the Union.[3] This, then, is not a situation in which a minority would be deprived of any remedy were it not for the duty of fair representation. Here, the Aztech employees had a remedy against the Union for the harm caused by the Union's negligence

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[3] Le'Mon observes that the Union and an El Paso, Texas, firm with considerably more Union-represented employees had entered into a collective bargaining agreement containing a "most-favored-nations" clause which provided that "there shall not be a more favorable contract offered to any competitor of the employer in the jurisdiction of Sheet Metal Local No. 49." Rec., vol. II, C.P. ex. 1, art. XX. Le'Mon then argues, inconsistently, that this El Paso contract induced the Union to strike to get wages comparable to those in the El Paso firm, and to file a late notice in order to make the strike illegal. The ALJ found that the El Paso contract was not "a legitimate consideration here" since Albuquerque and El Paso are a distant 270 miles apart, too far to be a factor to the Union. Rec., vol. III, doc. 1, at 12 n.8. The ALJ also noted that if the Union's object was to abandon the Aztech employees to save the El Paso contract, it did not need the excuse of an untimely notice.

Because we conclude there is sufficient evidence to support the ALJ's factual conclusions, we need not address whether the entire group of Aztech employees constituted a discriminated-against minority vis-a-vis the El Paso majority.

and they used that remedy: they petitioned for an election to oust the Union as the exclusive bargaining representative. This powerful remedy of ouster, available to the employees by virtue of their majority status, ensures that a union will have the proper incentives to represent the employees "without hostile discrimination, fairly, impartially, and in good faith." Steele, 323 U.S. at 204.

Despite the availability of the ouster remedy, Le'Mon nevertheless urges us to view the duty of fair representation as one which creates a kind of fiduciary obligation owed by the Union to all those it represents. The Supreme Court, however, has never conceived of the duty of fair representation in such a broad way.[4] To the contrary, the courts' role in assessing union actions in duty-of-fair-representation cases is generally analogized

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[4] In a recent case involving the right to a jury trial in duty-of-fair-representation cases, Justice Marshall, writing for four members of the Supreme Court, stated that "[j]ust as a trustee must act in the best interest of the beneficiaries, a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith." Chauffers, Teamsters & Helpers, Local No. 391 v. Terry, 110 S. Ct. 1339, 1346 (1990) (citation omitted). Justice Marshall reasoned that "just as a beneficiary does not directly control the actions of a trustee, an individual employee lacks direct control over a union's actions taken on his [or her] behalf." Id. (citation omitted) (emphasis added). Justice Kennedy, writing for two other justices, also found the trust analogy helpful in assessing the right to a jury trial, but he was careful to limit the breadth of this analogy and to emphasize that he did not which to "imply that a union acts as a trustee in all instances or that trust law, as a general matter, should inform any particular aspects of federal labor law." Id. at 1357.

This case of course is factually distinct from the situation which prompted Justice Marshall to draw the trust analogy. Although an individual employee may share many of the same characteristics as a relatively powerless beneficiary, a majority of represented employees, with the power to decertify a union, has little in common with the traits Justice Marshall ascribed to a trust beneficiary. Therefore, while some members of the Supreme Court would impose a kind of fiduciary duty on a union vis-a-vis individual employees, no justice has suggested a broader duty with respect to all of the represented class of employees.

to the "special scrutiny" courts must apply when analyzing legislative actions under the Equal Protection Clause. As the Supreme Court noted in Steele:

> "[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . but it has also imposed on the representative a corresponding duty."

Id. at 202; see also Gorman, Labor Law at 716 ("the democratic process within the union has induced . . . courts to accord special scrutiny to decisions which worsen the job status of workers whose only common characteristic -- while not as invidious as their color, sex, or national origin -- is their minority status within the union"); Harper & Lupu, Fair Representation as Equal Protection, 98 Harv. L. Rev. 1211 (1985); ALJ Opinion, rec., vol. III, doc. 1, at 7 ("the [union-employee] relationship requires only that the statutory representative provide equal protection to the employees it represents").

For these reasons, the Sixth Circuit has declined "to extend the duty [of fair representation] to cover a situation . . . where a member or group was not singled out for different treatment." NLRB v. Local 299, Int'l Bhd. of Teamsters, 782 F.2d 46, 51 (6th Cir. 1986). The alleged breach of duty in Local 299 included the union's failure to inform the employees that the company viewed them as engaging in an illegal work stoppage in violation of the contract. The court specifically rejected the argument that a fiduciary duty between a union and all its represented employees existed, and it held that "the duty of fair representation is implicated only when an individual or group is treated differently . . . than another individual, group or the collective." Id. at 51-52.

Because the concerns which prompted the Supreme Court to develop a duty of fair representation are not present in this case, we decline to extend the duty to situations in which the injury suffered is common to the majority of represented employees. Holding as we do that the union's duty of fair representation was not implicated in this case, we need not address the other contentions raised by Le'Mon.

The order of the NLRB is affirmed.

APPENDIX C

DECISION AND ORDER OF THE NLRB

September 30, 1988

291 NLRB No. 41

D--9165
Albuquerque, NM

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL--CIO (Aztech International, Ltd.)

and

Case 28--CB--2479

PETE LE'MON, an Individual

DECISION AND ORDER

On March 4, 1987, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent did not breach its duty of fair representation to the employees involved by failing to give timely Section 8(d)(3) notice to the Federal Mediation and Conciliation Service and any appropriate state agency or by

encouraging employees to continue striking after October 2, 1985.[1] Like the judge, we find that the Respondent's deficiencies in representing the employees amounted to no more than mere negligence.[2]

The difference between the majority and dissenting positions here is a narrow one. Our dissenting colleague states a willingness to accept as simple negligence the Respondent's failure to coordinate timing of the notice and commencement of the strike, but would base a violation of the duty of fair representation on the Respondent's conduct after October 2. Our difference, then, is limited to how we evaluate the Respondent's conduct after October 2.

By October 2, the Employer had delivered to the strikers letters stating that the strike was illegal because proper notice had not been given to the Federal Mediation and Conciliation Service and declaring that the strikers' employment was terminated and that they could apply for jobs as new employees.[3] Some strikers asked the Respondent's business agents about the letter, and the agents replied that it was company "rhetoric" or a company "ploy," and urged the strikers to "stick together." In making this response, without further investigating the situation or obtaining the advice of the Respondent's attorneys, the agents

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1 Notice was received by the Federal Mediation and Conciliation Service on September 17, 1985. The strike commenced October 1, 1985. All subsequent dates are in 1985.

2 There is no showing that the Respondent was hostile toward the employees at Aztech or acted in bad faith in representing them. In this regard, we agree with the judge's rejection of the Charging Party's implied bad-faith argument based on the "most favored nations clause."

3 Among other things the letter stated, "If you wish to be considered for such employment, please come in and fill out an application. As with all new employees, you will need to go through our normal pre-employment interview, physical and drug/alcohol screening."

may have acted negligently, but their conduct was not so lacking of a rational or logical basis as to be arbitrary.

In meeting the employees' questions, the agents assessed events from a practical point of view. As they saw it, loss of employment is a risk in any strike, and employees' best protection is to stick together. They considered the Employer's statement that the strikers' employment was terminated as a tactical maneuver designed to break the strike. The Board has recognized that employers use the tactical discharge as a method of dissuading employees from striking without intending to refuse to reinstate employees when they request it. Crookston Times Printing Co., 125 NLRB 304, 317 (1959). See also Woodlawn Hospital, 233 NLRB 782, 788 (1977).

The agents were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees.[4] Nor did they appear to appreciate the distinction between terminating strikers' employment and replacing strikers. Misunderstanding of this critical distinction, significant in labor law, is not uncommon among employees, their representatives, or management personnel. See Eagle Comtronics, 263 NLRB 515 (1982); L.A. Water Treatment, 286 NLRB No. 88 (Nov. 12, 1987); Dayton Food Fair Stores v. NLRB, 399 F.2d 153 (6th Cir. 1968).

Confronted with the Employer's statement that the strikers' employment was terminated, the agents advised the employees to continue to act together in an effort to return all employees to their jobs and to obtain a bargaining agreement. Within the limits of their competence and experience, the agents judged economic pressure to be the most effective strategy to deal with

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4 In part, Sec. 8(d) provides: "Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act . . . ."

the situation. We do not consider that judgment to be in reckless disregard of the Union's statutory duties to unit employees.[5] Indeed, even if the agents had understood that the strikers lost status as employees of the Employer by operation of statute or had in fact been permanently discharged by the Employer, there was little they could do to benefit the employees at that point. The employees could only apply for jobs as new employees, hope to meet the Employer's interview requirements, and see whether the Employer would reemploy them. It was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action.

Moreover, as the judge points out, the employees were free to accept the Union's advice or the Employer's advice. There is no evidence that the Respondent, by threat of fine or other retaliation, coerced the employees to continue collective action. The employees could have decided to abandon the strike or to apply individually for employment, a decision employees are customarily faced with during a strike. They could have implemented their decision on their own initiative, unrestricted by formalities within the Respondent's control. Indeed, the record reveals that many employees did abandon the strike. See Office Employees Local 2 (Janet Eichelberger), 268 NLRB 1353 (1984), enfd. 765 F.2d 851 (9th Cir. 1985).

The representation that the Respondent provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed. It does not, however, violate Section 8(b)(1)(A). A breach of duty of fair representation occurs only when the representative's conduct is "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171 190 (1967). We do not consider the conduct here to have been arbitrary, and the Respondent's deficiency in represen-

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5 We assume, arguendo, that a union that takes action in "reckless disregard" of its statutory duties to unit employees violates its duty of fair representation.

tation is a matter for employees to consider in selecting and supporting their representative, not a matter correctable under Section 8(b)(1)(A) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint.

Dated, Washington, D.C. September 30, 1988

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN STEPHENS, dissenting.

The duty of fair representation issue posed in this case involves the arbitrariness prong of the three-part standard formulated by the Supreme Court in Vaca v. Sipes, 386 U.S. 171, 190 (1967) (breach occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"). There is no claim that the Union's actions here were discriminatory, nor do I see this as a case involving bad faith. "Arbitrariness" has been the most difficult and vexing of the duty of fair representation inquiries.[1] I do not dispute the judge's reading of Board law as requiring a showing of more than mere negligence to warrant a finding that a union has acted arbitrarily so as to breach its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. That is clearly the holding of cases that are still good law. Teamsters Local 692 (Great Western Unifreight), 209 NLRB 446, 447--448 (1974). Accord: Rainey Security Agency, 274 NLRB 269 (1985); Teamsters Local 282 (Transit-Mix Concrete Corp.), 267 NLRB 1130 (1983), enfd. 740 F.2d 141 (2d Cir. 1984). There is not much guidance in our cases as to what that "more" necessarily consists of; but it makes sense to me to hold a union guilty of breaching the duty when it has erred in failing to perform some ministerial or procedural act and, with notice of that error and of the possibility that it may seriously injure rights of bargaining unit employees, the union has persisted in a course of action or inaction that compounds injury or makes it impossible to cure. Such conduct goes beyond negligence to reckless disregard.[2] In

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1 See Robesky v. Qantas Empire Airways, 573 F.2d 1082 (9th Cir. 1978) (Kennedy, J. concurring) (no adequate guidance in law of torts or Federal common law of labor relations for construing this term).

2 A standard formulated by the Ninth Circuit in connection with cases involving unions' handling of grievances reflects similar considerations. In a series of cases, that circuit seems to have concluded that the negligent failure to perform a ministerial act amounts to arbitrariness in breach of

[continued]

my view, that occurred here by virtue of the union agents' response to information they had received by at least October 2, 1985, the second day of the unlawful strike.[3]

I am willing to accept the proposition that a union's failure to coordinate the filing of a Section 8(d)(3) notice with the actual date on which the strike commences may constitute simple negligence not giving rise to actionable breach of the duty of fair representation, even where the error results in employees' being made vulnerable to discharge through participation in an unlawful strike. On the record here, however, I would find that the Union's business agents, Gary Briggs and George Gilliland, behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice of the clear possibility that the strike notice had not been timely given and that the Employer was taking action against the employees because of this.

It is undisputed that the strike notice was mailed to the Federal Mediation and Conciliation Service on September 17, 1985, and that therefore the strike called by the Union on September 30 and commenced on October 1 was plainly unlawful because it occurred less than 30 days after notice was given to the FMCS. The judge also found--and the finding is not disputed--that by October 2 Briggs and Gilliland knew that the Employer had sent letters to the strikers telling them that they were

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the duty of fair representation when there is no "judgment" factor involved in deciding whether to perform the act in question and "no rational and proper basis" for the union's conduct and the employee's right to pursue a claim representing a "strong individual interest" is completely extinguished by the union's conduct. Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), citing Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983), and Eichelberger v. NLRB, 765 F.2d 851, 855 (9th Cir. 1985).

3 All dates are in 1985.

terminated because they were engaging in a strike that was unlawful because of failure to give timely notice to the FMCS. The letter also informed the strikers that employment applications were being accepted for their jobs and they could fill out applications for positions as new employees.

Briggs then called the law firm that represented the Union; and, after learning that the attorney responsible for sending out the notice was out of town, he made no further effort to check out the timing of the notice. Instead, he encouraged employees to remain on strike, mistakenly advising them--according to his own testimony--that there was really no distinction between replacement and discharge and that they should just hang together. Union Agent Gilliland admitted that he had been "in the dark" about the legality of the strike, but nonetheless admitted telling employees who asked about their termination letters that this was just "some of the Company's rhetoric."[4]

Because I would find a breach of the duty of fair representation as of October 2, when Briggs and Gilliland affirmatively misled inquiring employees about the status of their strike, I would issue a cease-and-desist order and would also hold the

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4 While I recognize that Briggs and Gilliland are not lawyers and I therefore would not find a breach of the duty of fair representation simply on the basis of their inability to give correct legal advice, I find a breach of the duty here because they falsely gave the impression that they knew there was no difference between replacement and discharge and that the Employer's claim that the strike was unlawful was just "rhetoric." This would be a different case if the employees had been told that the union agents did not know whether there was any truth to the Employer's claims concerning the strike's legality but that they advised staying out on strike as a tactical matter.

Union liable for any losses suffered from employees' delay, until October 7, in offering to return.[5]

Dated, Washington D.C. September 30, 1988

James M. Stephens, Chairman

NATIONAL LABOR RELATIONS BOARD

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5 It is not clear when strikers were rehired, although the record shows that at least one of them was not hired back until December 20. In compliance, it could be determined on what dates the Employers hired replacements and, thus, what effect the delay in offering to return likely had on the strikers' ability to return to work.

JD(SF)--21--87
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL-CIO (Aztech International, Ltd.)

and Case 28--CB--2479

PETE LE'MON, an Individual

Lewis S. Harris, Albuquerque, NM,
for the General Counsel.
Dan A. McKinnon III, of Marron, McKinnon & Ewing,
Albuquerque, NM, for the Charging Party.
Gerald R. Bloomfield of Kool, Kool, Bloomfield
& Hollis, Albuquerque, NM, for Respondent.

DECISION

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me in Albuquerque, New Mexico, on October 21, 1986.[1] The complaint is based upon a charge filed

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1 Although no party has filed a motion to correct the transcript, any reviewer of the transcript should be wary for it contains numerous errors, omissions, and misidentifications. By way of illustration, the caption appearing in the

[continued]

by Pete Le'Mon, an Individual, on October 28, 1985.[2] The complaint alleges that Sheet Metal Workers' International Association, Local Union No. 49, AFL-CIO (herein called Respondent) has engaged in certain violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (herein called the Act).

Issue

The principal issue is whether Respondent breached its duty of fair representation under Section 8(b)(1)(A) when it failed to give the Federal Mediation and Conciliation Service 30 days notice of the existence of a labor dispute, thereby subjecting the employees it represented to loss of employee status as defined by Section 2(3) of the Act. More specifically, the case presents the question of whether Respondent is financially liable for wages lost by those employees when Aztech International, Ltd. discharged them for striking when Respondent failed to meet the notice filing requirement of Section 8(d)(3) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. All parties have filed briefs and they have been carefully considered. Based upon the entire record, as well as my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

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transcript volume is incorrect, labeling Charging Party Pete Le'Mon as Respondent, and Respondent Sheet Metal Workers' Local 49 as the Charging Party. It also omits entirely the appearance of Mr. Harris, Counsel for the General Counsel and misidentifies the Charging Party's attorney, Mr. McKinnon, as representing Respondent. Likewise, it lists Respondent's attorney, Mr. Bloomfield, as representing the Charging Party.

2 All dates are 1985 unless otherwise noted.

I. Interstate Commerce

Respondent admits the Employer, Aztech International, Ltd., is a New Mexico corporation headquartered in Albuquerque where it manufactures and markets heating panels and evaporative cooler units. It further admits that during the 12-month period preceding the issuance of the complaint that Aztech, in the course of its business operations, sold goods valued in excess of $50,000 which were transported directly to customers located outside New Mexico. It further admits that Aztech is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

Respondent admits it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Fortunately, given sometimes inaccurate nature of the transcript, the facts in this case are not in significant dispute. Respondent has represented Aztech's production employees for at least 15 years through a series of collective-bargaining contracts. The most recent agreement expired on September 30. Efforts to negotiate a successor agreement had begun several months before, but by September 30 a new one had not been reached.

Earlier on September 11, Respondent's attorney, Bloomfield, had sent a notice of the existence of a labor dispute to the Regional Office of the Federal Mediation and Conciliation Service in San Francisco. That letter was not received by the Service until September 17, only 13 days before the contract was to expire.

Section 8(d)(3) of the Act requires that such a notification be within 30 days of the termination or modification of the

contract in question. Section 8(d) further says in the event that any employee engages in a strike within any notice period specified in Section 8(d) he or she shall lose status as an employee for the purpose of obtaining protection under Sections 8, 9 and 10 of the Act.[3] The credible evidence demonstrates that neither Gary Briggs, Respondent's business manager, or George "Jeep" Gilliland, its business representative, were actually aware of the tardy notice.

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3 In pertinent part Section 8(d) of the Act reads as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--
>
> * * *
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute. . .
>
> * * *
>
> . . . Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

As early as April, business representative Gilliland began holding monthly meetings with the Aztech employees, first to learn what the employees wanted in the new contract and later to inform them of the progress of negotiations. On July 30, 60 days before the contract was to expire, Gilliland, both to test the employees' resolve and to send a signal of solidarity to the employer, conducted a vote to give the Union authority to strike in the event that became necessary. Gilliland recalls that those employees who voted, voted unanimously to authorize a strike. There were, he says, two or three abstentions.

An additional meeting was held in August and two in September as the contract expiration date approached. The first was on September 26 and the last on September 30. The September 30 meeting was, in essence, a split meeting designed to accommodate the employees on the two shifts.

Based upon an amalgamation of the testimony, it appears that at the September 30 meetings Briggs presented the Company's last contract offer. He said he was displeased with it in several respects. First, it did not contain a ban on subcontracting and, in his opinion, permitted the Employer to subcontract unit work even to the extent of getting rid of all unit employees while still claiming that Company products were union-made. Second, it contained a random drug-testing clause and, third, the wage offer was inadequate, containing no increases and only an opportunity for a bonus at the end of the first year. He told the employees that for the past 15 years or so he had heard their complaints about wages and about the manner in which the Company had treated them. He also told them that they could accept the offer but if they did he did not want to hear any further complaints about inadequate contract protection. He also told them if they rejected the contract their other choice was to strike. It does not appear that he offered them the middle ground of not striking but continuing to negotiate. In his judgment, such a middle ground would have been impractical, given the status of the negotiations. Briggs told the employees

that if they struck there were some risks involved. These included being replaced or being fired.

At least one employee asked Briggs if he would sign the contract as it had been proposed. According to the employee's testimony Briggs equivocated, finally saying he could not live with a contract like the one the Employer was offering. As a result of Briggs' answer, some employees testified that Briggs was exhorting them to strike. Indeed, it appears that some picket signs had already been made. Even so, I am not convinced that Briggs was making any special effort to exhort them to strike, though it is clear that he disliked the Company's proposal.

In any event the employees were asked to vote to accept or reject the contract proposed by the Employer. At each meeting the secret ballot showed that the employees voted to reject it. As a result, in the early morning hours of Tuesday, October 1, Respondent established a picket line at Aztech's premises.

The strike lasted until the morning of Monday, October 7. It fell apart when the Employer discharged all the strikers, simultaneously filing Section 8(b)(3) charges against Respondent for having failed to comply with the Section 8(d)(3) notice requirements set forth in footnote 3, above. On October 1, the Employer had hand-delivered and/or mailed discharge letters to each of the striking employees. In the letter Aztech's president, Bennet King, stated:

> The strike in which you are participating is an illegal one because the Union failed to give proper notice to the Federal Mediation and Conciliation Service of the existence of a labor dispute so that the FMCS might have an opportunity to help us find solutions to the collective bargaining impasse. Because of this failure by the union, employees engaged in the strike are not protected by the National Labor Relations Act against firing. This letter will serve as formal notice of your

termination of employment by Aztech International, Ltd. effective immediately. . . .

Also on October 1, the Employer filed its Section 8(b)(3) charge against the Union. On October 4, the Regional Office of the Board issued a complaint against the Union alleging that the strike was unlawful.[4] The following day an article in the Albuquerque Journal newspaper noted the issuance of the complaint, together with a quotation from the NLRB Albuquerque Resident Officer asserting that the picketing was illegal.

The Employer's president, King, took several of the strikers, including the Charging Party, to his office where he reported the issuance of the complaint to them and showed them the newspaper article.

Before the newspaper article appeared Briggs and Gilliland had told those strikers who had asked about the assertions King had made in the discharge letter that they regarded King's letter as a company tactic, saying the Company was "playing with their heads." They urged the strikers to remain together if they intended to win the strike. After the newspaper article appeared Briggs and Gilliland continued to say the same thing.

It should be observed here, that although by October 2 Briggs and Gilliland were aware of the Company's contention that the strike was illegal, they did not believe it. Both Briggs and Gilliland believed that at worst, if the FMCS notice had not been given, the strike was unprotected. Thus, they surmised that the worst which could happen was that a court could enjoin the picketing. If that happened, they reasoned, the court could probably not make them go back to work. The discharges, which were by then a fait accompli, did not particularly concern them because, as Briggs had told the employees before, employers

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4 See Fort Smith Chair Co., 143 NLRB 514, 518-519 (1963).

often attempt to win strikes by replacing the strikers. To Briggs that is exactly what was happening here.

Briggs testified that when he learned of the Company's contention that the notices had not been filed, he had attempted to reach attorney Bloomfield but could not do so as he was out of town. Briggs spoke to another individual at Mr. Bloomfield's law firm but it is not clear whether he learned of the late filing with the FMCS. He testified he did not know if he had ever actually seen the letter which had been sent to the FMCS, saying that was within the province of the Union's lawyers. Based on Briggs' testimony I conclude that during the course of the strike, because of Mr. Bloomfield's absence, he was unable to find out whether the FMCS letter had been sent timely.

Despite his inability to find out from the law firm what had actually happened, Briggs, thinking as a traditional union official would, decided to "tough it out." He believed that whether the strike was legal or not, as long as the strikers could maintain solidarity there was a reasonably good chance that they could put enough economic pressure on the Company to prevail. Although the testimony is a little vague as to time and place, it appears that remarks of that nature were made to strikers Le'Mon, Limon, Padilla and Tucker.

Nonetheless, on the morning of October 7 it became apparent that most of the strikers were abandoning the strike. Upon seeing that, Briggs told the remaining strikers that the strike had been lost and that they should go back to work so as not to be left alone.

The record is not clear with respect to how many employees Aztech rehired or what the rate of rehire was. Some, who had not been replaced, were rehired immediately; others were hired later. All were rehired as new employees.

Subsequently, the employees, upset over the Union's handling of the strike, filed a decertification petition under

Section 9(c) of the Act seeking an election to oust the Union as their representative. Upon receipt of the decertification petition Respondent disclaimed interest in representing Aztech's production and maintenance employees.

IV. Analysis and Conclusions

The General Counsel asserts that Respondent's failure to file timely the 30-day notice of labor dispute with the FMCS as required by Section 8(d) followed by a strike within the 30-day period was a breach of a union duty, said to be fiduciary, which in turn amounts to a breach of the duty of fair representation and therefore an unfair labor practice within the meaning of Section 8(b)(1)(A). Respondent argues that the evidence shows only that it committed an error of negligent omission and that under the fair representation doctrine an act of negligence does not breach that duty. The threshhold question therefore is what is the appropriate level of care which Respondent must exercise to avoid liability under the doctrine? Is Respondent a fiduciary, thereby raising the level of care which must be taken by Section 9(a) representative or is Respondent something less than a fiduciary owing no duty other than one of fair play?

In the seminal case of Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944), the Supreme Court in articulating the fair representation doctrine described the nature of a union's relationship to the individuals it represents as the exclusive statutory representative:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both

> to create and restrict the rights of those whom it represents. . . .

Similarly, the Board has held that a union does not stand in a fiduciary relationship to the employees it represents. It has said, instead, that the relationship is analogous to that between the legislator and constituent. Service Employees, Local 579 (Beverly Manor Convalescent Center), 229 NLRB 692, fn. 2 (1977). It appears therefore that Respondent's duty to the Aztech employees here was not a fiduciary one, for the Supreme Court and the Board have both held that the relationship requires only that the statutory representative provide equal protection to the employees it represents. This is not to say that the statutory representative cannot make reasonable choices in carrying out its function even though those choices may have incidental negative effects on some of its constituents. Steele, supra, at 203; cf. Ford Motor Corp. v. Huffman, 345 U.S. 330 (1953).

In Steele the Court went on to say that although a union's duty to the employees it represents is comparable to the duties of a legislative body, nonetheless the statutory grant of the exclusive right to represent the employees "impose[s] on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele, supra, at 202-203.

The duty of fair representation was not initially considered by the Board to be an unfair labor practice, but in Miranda Fuel Co., 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2nd. Cir. 1963), the Board concluded that the fair representation doctrine was subsumed under Section 8(b)(1)(A) of the Act. There it stated:[5]

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5 140 NLRB 181, 185.

> . . . [W]e are of the opinion that Section 7 [of the Act] thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. [Footnote omitted.]

Although the Second Circuit would not enforce the Board's theory that a failure to meet the duty of fair representation was an unfair labor practice within the meaning of Section 8(b)(1)(A), the Supreme Court disagreed in Vaca v. Sipes, 386 U.S. 171 (1967). After reaching that conclusion, the Court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Humphrey v. Moore, [375 U.S. 335 (1964)]; Ford Motor Co. v. Huffman, [supra]. (Vaca v. Sipes, supra at 190.)

The Court, noting that the Vaca case arose in a context involving the manner in which a union processed the plaintiff's grievance, added that it accepted the proposition that a union may not arbitrarily ignore meritorious grievance or process it in a perfunctory fashion. (Emphasis supplied.)

As a result of Vaca the duty of fair representation is now often described as one in which a union may not act arbitrarily, invidiously, irrelevantly, unfairly or perfunctorily in carrying out its representational duties. The Vaca court even recognized that those phrases had become cause for debate with respect to the scope of their meaning. It had hoped to be able to provide clarity with respect to defining those phrases. Despite that effort,

the duty itself remains somewhat murky depending on the fact pattern being presented. The Board has generally held that duty of fair representation is not breached where the union is forgetful, commits an inadvertent error, or is negligent. Local 18, Operating Engineers (Ohio Pipeline Construction Co., 144 NLRB 1364 (1963); Teamsters Local 692 (Great Western Unifreight System), 209 NLRB 446 (1974).

Yet the courts have had some difficulty in determining the breach of the duty where errors, omissions and negligence caused results which severely damaged an employee's rights, privileges or status. For example, the Ninth Circuit in Dutrisiac v. Caterpillar Tractor, 349 F.2d 1270 (1983) was faced with a situation where a union missed a deadline for filing a grievance. The court found that meeting a deadline for the filing of a grievance was simply a ministerial act and easy to carry out. It appeared to recognize that the failure to file was simply an act of negligence but observed that the grievant's interests which were at stake were strong and that the union's omission totally extinguished the grievant's right to pursue his case. In that circumstance the court held that it was a breach of the duty of fair representation to fail to complete the ministerial act of filing a grievance in a timely way. Despite some language of the majority claiming that it was not finding a breach of the duty for simple negligence, Judge Norris disagreed in his concurring opinion. Given the facts of the case, it appears to me that Judge Norris is correct in his assessment that the court relied on simple negligence to find a breach of the duty.[6] Nonetheless, the Ninth Circuit's analysis has some analytical impact here. It is quite true that meeting a filing deadline is a ministerial act which can be easily met. It is equally true that a missed deadline can quite often result in great harm to an individual's rights or status. Indeed, it can be reasonably argued that the deadline which Respondent missed here is no

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6 Judge Norris was relying on comments made by Judge Anthony M. Kennedy in Robesky v. Quantas Empire Airways, 573 F.2d 1082 (9th Cir. 1978).

different from the deadline which was missed in Dutrisiac. Yet, can it be said in either case that the failure to file was arbitrary, discriminatory, invidious, irrelevant or perfunctory? It is hard to characterize forgetfulness or mistake as any of those although the Dutrisiac court appears to have done so.

Earlier, the Ninth Circuit had stated in Robesky v. Qantas Empire Airways, 573 F.2d 1082, 1092 (1978) in a grievance-handling context that the union's failure to disclose fully the conditions of a settlement proposal, even though unintentional, had nonetheless been so reckless that the union could not be shielded from liability under the fair representation doctrine. It said the omission was "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary," citing Ruzicka v. General Motors, 523 F.2d 306 (6th Cir. 1975). Ruzicka was another case in which the union failed timely to file a grievance and held that the failure amounted to arbitrary and perfunctory handling of the grievance sufficient to invoke the doctrine.

Despite its language in Ruzicka, the Sixth Circuit has recently begun to reanalyze the utility of the Vaca/Miranda Fuel tests finding them to be unclear. See NLRB v. Teamsters Local 299 (McLean Trucking Co.), 782 F.2d 46, 121 LRRM 2478, 2482 (1986). That case has some striking similarities to the case before me and is one in which the Board found a violation. Indeed, the General Counsel argues that the underlying Board case, Teamsters Local 299 (McLean Trucking Co.), 270 NLRB 1250 (1984) controls here even though the Sixth Circuit denied enforcement. At the risk of over-distilling the facts, McLean involved a company whose collective-bargaining contract contained a modified no-strike clause. When a dispute arose with respect to the layoff of a small group of employees, the union demanded, over the protest of the company, to hold a meeting on the company premises during worktime. The employer asserted to the union officials that the meeting was a breach of the no-strike clause, and that the employees could be disciplined. The union nonetheless conducted the meeting, never telling the employees

that the company regarded it as an illegal work stoppage or that the Company could discipline them. The employer, upon pursuing the matter, determined that the meeting was not an exception to the no-strike clause, and subsequently disciplined the employees in accordance with the terms set forth in the contract.

The Board held the union in McLean breached the duty of fair representation when it encouraged the employees to stop work in violation of the no-strike clause and when it exposed them to discipline, a risk it had failed to explain. The Board held that the union's claim that the work stoppage was only a meeting was not a good faith position and that the union had deliberately misled the employees with respect to the consequences of their action. It held that the employees "had a right to expect that the Union would not encourage them to violate the contract in a way that would expose them to a loss of income or even employment." Specifically, it relied on both Miranda and Vaca in reaching its conclusion that the Union's contract was arbitrary. 270 NLRB 1250, 1252.

The Sixth Circuit, however, regarded the Board's decision as an assertion that the duty of fair representation "imposes an affirmative obligation on a union to inform its members of possible disciplinary consequences for participating in at least some forms of union activity." It then said that after careful review of the case law it believed that there was no support for interpreting the duty of fair representation to encompass the fact pattern before it. It noted that both Vaca and Ruzicka involved the arbitrary handling of an individual's grievance. It observed that even though the individuals in those cases had not been discriminated against in the classic sense and even if the Union had not acted in bad faith, the grievants were alleging treatment disparate from other members. It stated that the Board's position with respect to the application of the Vaca logic was "completely out of context" and

> . . . [w]ould require us to extend the duty [of fair representation] to cover a situation involving a work

> stoppage rather than collective bargaining or grievance processing, and where a member or group was not singled out for different treatment. In other words, the duty would be expanded to include an undefined fiduciary duty which a union owes to its unit as a whole. Such a duty could impose on a union an obligation to authorize a strike, or any number of other affirmative actions. We decline to extend the duty so far, since we believe the duty of fair representation was never intended to be "catch-all" for undesirable union activity. * * * We conclude as a matter of law, that the duty of fair representation is implicated only when an individual or group is treated differently by a union--either through discriminatory, bad-faith, or arbitrary conduct--than another individual, group or the collective. Since such differential treatment was not alleged in this case, we find that the Board was incorrect as a matter of law to find a violation of the duty of fair representation. We therefore decline to consider the Miranda Fuel question, and cannot grant enforcement on this basis.

Thus, both the Ninth and the Sixth Circuits have questioned the utility of the Miranda/Vaca language and have now come down on different sides of the issue. The Ninth Circuit is willing to say that negligence in some circumstances is a perfunctory act; the Sixth Circuit has said that even a deliberate, apparently reckless, act resulting in the destruction or impairment of employee rights or status is not a breach of the duty so long as the employee is not treated differently than others and even then only if the union's conduct is discriminatory, arbitrary or in bad faith.

The foregoing discussion does not resolve the specific fact pattern before me. I advert to it, however, with the specific purpose of observing that fair representation cases of the kind presented here are not straightforward. Indeed, both courts have strongly suggested that the Miranda/Vaca language is not of bright-line assistance in determining this kind of case. The Sixth

Circuit in McLean even goes so far as to say that language arising from grievance-handling cases with respect to what a union must do to inform its members of the consequences of their acts in other fact patterns is inappropriate. The Board, of course, had held the opposite.

In the instant case the Union did not inform the Aztech employees that the Section 8(d) notice to the FMCS had not been timely filed principally because its officials did not know it. I should observe here that there is a significant factual difference between Respondent's omission here and the Teamsters' omission in McLean. In McLean the union knew it was risking a breach of the no-strike clause. Indeed as the meeting began the employer informed the union that it was breaching that section of the contract. Aztech's King did not make a similar warning and I credit the Union's evidence that it took several days to find out what had actually happened with respect to the FMCS filing. In the meantime, of course, the Employer had already taken the disciplinary act which Section 8(d) permitted it to take. It can clearly be said that the Teamsters' act in McLean was taken knowingly and with reckless disregard for employee rights. The same cannot be said of Respondent's omission. Thus, the Board's decision in McLean is factually distinguishable from the case presented here, even without regard to the Sixth Circuit's decision to deny enforcement. I must disagree therefore with the General Counsel who urges that the Board's decision in McLean controls.

Instead, seems to me that the General Counsel has not shown that the Union's failure to file the FMCS notice was anything other than an act of negligence, mistake or inadvertence. Under Board law as set forth in Local 18 Operating Engineers (Ohio Pipeline Construction Co.), supra, and Teamsters Local 692 (Great Western Unifreight System), supra, no breach of the duty can be made out. The only two theories which I can see which would require a finding of a violation is either an adoption of the General Counsel's fiduciary duty theory or the Ninth Circuit's analysis with respect to a failure to perform

a ministerial act. The fiduciary theory would of course impose a higher duty of care upon the union than is normally seen in fair representation cases. I think it is fair to conclude that if the Union's duty is that of a fiduciary, it failed to meet it. However, I have already noted that the fiduciary duty does not exist here.[7] Moreover, the Board has not accepted the Ninth Circuit's approach here. In fact the Board has held ". . . it is not every act of disparate treatment or negligent conduct which is proscribed by Section 8(b)(1)(A), only those which have been motivated by hostile, invidious, irrelevant, or unfair considerations. . ." Steelworkers Local 2869 (Kaiser Steel Corp.), 239 NLRB 982 (1978). Thus, while we may be offended by Respondent's failure to file the FMCS notice and its consequent negative impact upon the employment status of the individuals Respondent represented, it appears that under current Board law the Respondent did not breach the duty of fair representation when it called the strike.[8]

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7 The Board has imposed a fiduciary obligation on unions in the enforcement of union security clauses. See Conductron Corporation, 183 NLRB 419, 429 (1970); Rocket and Guided Missile Lodge 946, IAM (Aerojet-General Corp.), 186 NLRB 561, 562, (1970) and cases cited in fn. 1; Boilermakers Local 732 (Triple A Machine Shop, Inc., 239 NLRB 504, (1978).

8 The Charging Party has observed that Respondent was subject to a "most-favored-nations" clause in a contract with an El Paso, Texas firm. He argues that Respondent could not politically accept a lower rate in Albuquerque without risking wage cuts at the larger El Paso company. He says it follows, therefore, that Respondent specially exhorted Aztech's employees to strike to obtain the El Paso rate. Whether the employees won or lost, he argues, the Respondent was acting improperly. If the employees succeeded, Aztech, already financially precarious, would be rendered uncompetitive and forced out of business. If they failed and the strike was lost, Respondent would not be obligated to sign a new contract. Either way the El Paso contract would not be jeopardized.

I do not accept the premise. Respondent had a specific purpose in Albuquerque, to obtain a new contract with Aztech. El Paso is 270 miles distant and probably not much of a consideration to the Union as it sought a new contract in Albuquerque. More significant is the observation that

[continued]

Moreover, as it breached no duty of fair representation at the time of the calling of the strike and, as the employees were discharged almost instantly thereafter, it was faced with a fait accompli. The employees were free to either accept the Union's advice or the Employer's advice and to make their own decisions thereafter. Briggs' and Gilliland's statements to employees after the strike was under way that to win the strike they had to stick together was only the ordinary encouragement of a union official to maintain solidarity during a labor dispute. Such statements do not amount to any special encouragement to continue to strike in the face of an unreasonable risk. Therefore, I cannot find a violation based upon the General Counsel's second theory either, that a breach of the duty occurs when the Union fails to tell its employees to go back to work.

Indeed, it seems to me that the Aztech employees took the steps that one would expect them to take against a union which failed adequately to represent their interests. They fired the Union as their representative when they filed their decertification petition and induced the disclaimer of representation. That is certainly the most appropriate means of punishing a representative which has made such a horrendous error.

Based on the foregoing findings of fact and the record as a whole, I hereby issue the following:

---

even if Respondent was concerned with the most favored nations clause in El Paso, it did not need to file a late notice with the FMCS to create a dispute justifying the abandonment of the Aztech employees to save the El Paso contract. Any strike would have accomplished that. Therefore, I do not regard the El Paso most favored nations clause to be a legitimate consideration here. The Charging Party's position with respect to it is illogical.

Conclusions of Law

1. Aztech International, Ltd. is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent, Sheet Metal Workers' International Association, Local No. 49, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in no violations of the Act as alleged in the complaint.

Based upon the foregoing findings of fact and conclusions of law, I hereby issue the following recommended:[9]

ORDER

The complaint is dismissed in its entirety.

Dated: March 4, 1987

/s/

James M. Kennedy
Administrative Law Judge

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9 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX D

COMPLAINT AND NOTICE OF HEARING

April 21, 1986

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL-CIO (Aztech International, Ltd.)

and Case 28-CB-2479

PETE LE'MON, an Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by Pete Le'Mon, an individual (herein called Le'Mon), that Local 49, Sheet Metal Workers International Association, AFL-CIO (designated in the caption hereof by its correct name and herein called the Respondent), has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (hereinafter called the Board), by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge herein was filed by Le'Mon on October 28, 1985, and a copy thereof was served by certified mail upon the Respondent on the same date.

2. Aztech International, Ltd. (herein called Aztech), is now, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New Mexico.

3. At all times material herein, Aztech has maintained an office and principal place of business in Albuquerque, New Mexico, where it is engaged in the manufacture and marketing of heating panels and evaporative cooling units.

4. During the past 12-month period, which period is representative of its operations at all times material herein, Aztech, in the course of its business operations described above in paragraph 3, sold goods valued in excess of $50,000 which were transported in interstate commerce and delivered to customers outside the State of New Mexico.

5. Aztech is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(5) of the Act.

6. The Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. (a) At all times material herein, Gary Briggs has occupied the position of business manager of the Respondent, and is now, and has been at all times material herein, an agent of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

(b) At all times material herein, George "Jeep" Gilliland has occupied the position of business representative of the Respondent, and is now, and has been at all times material herein, an agent of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

8. At all times material herein, by virtue of Section 9(a) of the Act, the Respondent has been, and is now, the exclusive bargaining representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, of all employees of Aztech in the following unit:

> [A]ll production employees of [Aztech], excluding only supervisors, office clerical help, watchmen and guards as defined in the National Labor Relations Act of 1947, as amended.

9. At all times material herein, the Respondent and Aztech have maintained in effect and have enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of the employees of Aztech in the unit described above in paragraph 8, which, by its terms, expired on September 30, 1985.

10. (a) On or about October 1, 1985, the Respondent engaged in a strike, and continued to engage in a strike, against Aztech until on or about October 7, 1985.

(b) The object of the strike described above in subparagraph 10(a) was in furtherance of the Respondent's reopening of the collective-bargaining agreement described above in paragraph 9, and the demand for a successor agreement to it.

(c) Commencing on or about October 1, 1985, and continuing to October 7, 1985, the Respondent, in the furtherance and support of its demands as described above in subparagraph 10(b), picketed at Aztech's Albuquerque, New Mexico, facility with picket signs stating "Aztech International, No Contract, SMWIA, Sheet Metal Workers, Local Union #49."

11. On or about September 17, 1985, the Respondent served a written notice on the Federal Mediation and Conciliation Service of the existence of a dispute between the Respondent and Aztech, as described above in subparagraphs 10(a) through 10(c).

12. The Respondent commenced the conduct as described above in paragraph 10, and its subparagraphs, less than 30 days after service of the notice described above in paragraph 11.

13. Since on or about September 30, 1985, the Respondent by its agents has failed to fairly represent employees of Aztech by the following acts and conduct:

(a) On or about September 30, 1985, the Respondent, through Gary Briggs, induced and encouraged employees to vote in favor of striking Aztech despite its knowledge that it had not complied with the 30-day time period required for notice of the existence of a dispute, as set forth in Section 8(d)(3) of the Act.

(b) On or about October 1, 1985, the Respondent, through George "Jeep" Gilliland, willfully encouraged employees to continue its strike of Aztech by affirmatively misrepresenting to employees that proper notice had been made in compliance with the provisions of Section 8(d)(3) of the Act.

(c) On or about October 2, 1985, and continuing through October 7, 1985, the Respondent, through Gary Briggs and George "Jeep" Gilliland, continued to encourage employees to participate in the strike against Aztech despite its knowledge that it had not complied with the provision of Section 8(d)(3) of the Act.

14. As a consequence of the Respondent's acts and conduct described above in paragraph 13, and its subparagraphs, certain striking employees of Aztech suffered loss of employment, wages, seniority rights, and other employment benefits.

15. By the acts and conduct described above in paragraph 13, and its subparagraphs, in connection with its representative status as described above in paragraphs 8 and 9, the Respondent has failed to represent the employees of Aztech by engaging in unfair, arbitrary, and invidious conduct, which conduct constitutes a breach of the fiduciary duty owed to employees whom it represents.

16. By the acts and conduct described above in paragraph 13, and its subparagraphs, and paragraph 15, and by each of said acts and conduct, the Respondent has restrained and coerced,

and is continuing to restrain and coerce, employees in the exercise of the rights guaranteed by Section 7 of the Act, and the Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

17. The acts and conduct of the Respondent described above in paragraphs 13, 15, and 16, occurring in connection with the operations of Aztech, described above in paragraphs 2 through 5, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

18. The acts and conduct of the Respondent described above constitute unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, which affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 13, 15, and 16, the General Counsel seeks an order providing that Respondent:

> Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that commencing at 9 a.m. (MDT), on May 20, 1986, and continuing on consecutive days thereafter until concluded, a hearing will be conducted in the Hearing Room, National Labor Relations Board, Patio Plaza Building, 5000 Marble Avenue NE, Albuquerque, New Mexico, before a duly designated administrative law judge of the Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned, acting in this matter as an agent of the Board, an original and four copies of an answer to said complaint within 10 days from the service thereof, and that, unless the Respondent does so, all of the allegations in the complaint shall be deemed to be true and shall be so found by the Board. You are also notified that, pursuant to said Rules and Regulations, the Respondent shall serve a copy of the answer on each of the other parties.

Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as amended, is attached.

Dated at Phoenix, Arizona, this 21st day of April, 1986.

/s/
Roy H. Garner, Regional Director

APPENDIX E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

§ 7 NLRA, 29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 8(b)(1)(A) NLRA, 29 U.S.C. § 158(b)(1)(A)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

§ 8(d) NLRA, § 29 U.S.C. § 158(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution

of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be

the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

§ 9(a) NLRA,
29 U.S.C. § 159(a)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(2)

No. 90-400

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute to mediation authorities before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the tardy strike notice.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-400

PETE LE'MON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 902 F.2d 810. The decision and order of the National Labor Relations Board (Pet. App. 14a-22a), including the decision of the administrative law judge (Pet. App. 23a-41a), are reported at 291 N.L.R.B. No. 41.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 7, 1990. On August 6, 1990, Justice White granted an extension of time within which to file a petition for certiorari to and including September 5, 1990. The petition was filed

on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed at the Albuquerque, New Mexico manufacturing plant of Aztech International, Ltd. ("the Company"). The Company's employees were represented by the Sheet Metal Workers' International Union No. 49, AFL-CIO ("the Union"), and were covered by a collective bargaining agreement effective until September 30, 1985. Pet. App. 5a, 25a. In Spring 1985, the Union initiated negotiations for a new agreement. Thereafter, the employees voted to authorize the Union to call a strike should negotiations fail. On September 30, Union Business Agents Gary Briggs and George Gilliland met with the employees to discuss the Company's final contract offer. Briggs expressed the view that the offer was inadequate. He told the employees that their only options were to accept the contract or to strike, and he explained that a strike entailed the risk that they would be replaced or fired. Pet. App. 27a-28a. On October 1, the employees went on strike, and established a picket line at the Company's premises. Pet. App. 28a.

On the day the strike began, Company President Bennett King hand-delivered or mailed to each of the strikers a letter stating that the strike was illegal because the Union had failed to give proper notice of a labor dispute to the Federal Mediation and Conciliation Service (FMCS);[1] therefore, the letter stated,

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[1] Section 8(d)(3) of the Act, 29 U.S.C. 158(d)(3) (Pet. App. 50a), requires a party seeking termination or modification of collective agreement to give the FMCS notice at least 30 days before the expiration of the contract. Section 8(d)(4), 29 U.S.C. 158(d)(4), precludes a strike within 60

the National Labor Relations Act ("the Act") did not protect the strikers from discharge, and the strikers were discharged effective immediately. The letter added that strikers who wished to return to work would have to fill out applications to be hired as new employees. Pet. App. 28a-29a.

When several strikers asked Briggs and Gilliland about the Company's discharge letter, they responded that it was a "ploy" and "rhetoric." The Union agents advised the employees to "stick together." Briggs added that, regardless of the legality of the strike, the strikers could prevail if they could put enough pressure on the Company. Pet. Ap. 15a, 29a-30a.[2] On October 5, an article in a local paper reported that the Board's Regional Office had issued an unfair labor practice complaint based on the Company's charge that the notice was untimely. The article quoted a Board official's assertions that the picketing was unlawful. Pet. App. 29a. After publication of the ar-

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days of the requisite notice (Pet. App. 50a). Section 8(d) further provides that "[a]ny employee who engages in a strike within * * * [the 60 day] period * * * shall lose his status as an employee of the [struck] employer * * * for purposes of [the Act]." Pet. App. 51a.

[2] Neither Briggs nor Gilliland was aware that the Section 8 (d) (3) notice was late. Pet. App. 25a-26a. The Union's attorney, Gerald Bloomfield, had in fact mailed untimely notice to the FMCS on September 11, and the FMCS received it on September 17, 13 days before the contract was to expire. Briggs attempted several times to reach Union Attorney Bloomfield to ask about the notice, but Bloomfield was out of town. Briggs spoke with another attorney in Bloomfield's office but was unable to learn the date or circumstances of the filing. Pet. App. 29a-30a. Briggs and Gilliland thought the Company's contention that timely notice of the strike had not been given was erroneous. Pet. App. 15a, 29a-30a.

ticle, Briggs and Gilliland continued to tell strikers that the discharges were a company tactic and that the strikers should "stick together" and try to win the strike. Pet. App. 29a.

By October 7, most of the strikers had abandoned the strike. Briggs then told the remaining strikers that the strike had been lost and that they should try to go back to work. Pet. App. 30a. Some strikers who had not been replaced were rehired immediately by the Company; others were rehired subsequently. All of the strikers who were rehired came back as new employees. Pet. App. 30a.

Employees subsequently filed a petition with the Board's Regional Office seeking an election to decertify the Union as their collective bargaining representative. When the Union received the petition, it disclaimed interest in representing the employees. Pet. App. 30a-31a.

2. Based on petitioner's charge, the Board's Regional Office issued a complaint alleging that the Union breached its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by its conduct respecting the strike. Pet. App. 23a-24a. The Board (Chairman Stephens dissenting in part), in agreement with the administrative law judge, dismissed the complaint. Pet. App. 14a-15a.

The Board explained that, while the Union's representation here "may not meet the standards of competence and caution that the Board would like to see observed[,] * * * [a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'" Pet. App. 17a (citing *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967)). Applying that standard, the Board

unanimously agreed with the ALJ that the Union's failure accurately to coordinate the strike with the required notice-filing was "no more than mere negligence," and therefore did not violate the duty of fair representation. Pet. App. 15a.[3]

The Board majority also found that the Union's conduct after October 2 "was not so lacking of a rational or logical basis as to be arbitrary." Pet. App. 16a. The Board explained that the Union agents thought that job loss was a risk in any strike, and that tactically the employees' "best protection" was to continue the strike even if the notice was deficient. Moreover, "even if the agents had understood that the strikers lost status as employees of the [Company] by operation of statute or had in fact been permanently discharged * * *, there was little they could do to benefit the employees at that point." Pet. App. 17a. Since the employees had to apply for jobs as new employees, the Board concluded that "[i]t was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action."[4] *Ibid.*

3. The court of appeals agreed with the Board that the Union had not breached its duty of fair repre-

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[3] The Board assumed, arguendo, "that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation." Pet. App. 17a n.5.

[4] Chairman Stephens would have found "that the Union's business agents * * * behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice [as of October 2] of the clear possibility that the strike notice had not been timely given and that the [Company] was taking action against the employees because of this." Pet. App. 20a.

sentation. However, the court did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca* v. *Sipes*. Rather, it held that the duty of fair representation is not implicated when "the injury suffered is common to the majority of represented employees." Pet. App. 13a. The court explained that, "[a]s the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights, whether in collective bargaining or in the handling of grievances, has been emphasized consistently." Pet. App. 9a. Since "the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of [Company] employees represented by the Union," the court concluded that the employees, "by virtue of their majority status," had available to them the "powerful remedy of ouster"—which they used—and thus did not need the protection afforded by the duty of fair representation. Pet. App. 10a-11a.

ARGUMENT

Petitioner contends (Pet. i, 11-12, 19-20) that it was a *per se* breach of the duty of fair representation for the Union not to fulfill its statutory duty timely to file the Section 8(d) notice with the FMCS and to fail to inform the employees of that default and of its consequences prior to their decision to strike.[5] We believe that the Board properly applied

[5] Petitioner also contends (Pet. i) that it was a *per se* violation of the Union's duty of fair representation not to advise the employees of its failure to file timely notices and the consequences of that inaction *before* the employees voted to reject the Company's contract proposal and commence a strike. Since, at that point, the Union did not know that the notices

the standard established in *Vaca* v. *Sipes*, as elaborated in *United Steelworkers of America* v. *Rawson*, 110 S. Ct. 1904, 1911 (1990), to conclude that conduct by a union attributable to mere negligence—regardless of whether it violated a "mandatory" duty—is not "arbitrary" conduct that would constitute a breach of the duty of fair representation. The Board was also correct in deciding that, on the facts of this particular case, the union's conduct both before and after the strike was fairly attributed to mere negligence. Since the Board's rationale fully supports the judgment below, we believe that further review is not warranted.

The Court may wish, however, to hold this case pending the Court's review of the Fifth Circuit's decision in *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438 (1989), cert. granted, No. 89-1493 (Oct. 1, 1990). The Tenth Circuit in the present case upheld the Board's decision on the theory that the duty of fair representation, as articulated in *Vaca* and other decisions, is not applicable to union conduct that, even if arbitrary, uniformly affects the majority of the bargaining unit. *O'Neill* raises the issues, in the contract negotiation context, of whether the *Vaca* standard is applicable and of what criteria are appropriate for determining whether the duty of fair representation has been breached. Although *O'Neill* does not directly address the rationale

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had not been timely filed, petitioner's additional contention adds nothing to his first contention that the Union's negligence, with its serious consequences, breached the duty of fair representation. By contrast, Chairman Stephens, dissenting in part from the Board's decision, would have found the Union's conduct arbitrary only after October 2, 1985, when it was on notice of the possible consequences of the failure to file timely notice with the FMCS. Pet. App. 19a.

adopted by the Tenth Circuit in this case, *O'Neill* does present the Court with an opportunity to consider the standards by which claims under the "arbitrariness" prong of *Vaca* are to be judged. Thus, the *O'Neill* decision may well shed light on the validity of the court of appeals' rationale in this case.

1. Petitioner does not dispute (Pet. 9-10) the application here of the *Vaca* three-part standard for determining whether a union has breached its duty of fair representation—*i.e.*, whether the union's "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. Rather, petitioner contends (Pet. i, 19-20) that a union's failure to perform a mandatory statutory obligation with deleterious consequences for unit employees should be deemed arbitrary *per se*. In advancing this contention, petitioner does not dispute the Board's finding that the union's unfortunate conduct in this case was due to mere negligence; he claims instead that the particular type of negligent conduct at issue in this case ought to be treated as arbitrary *per se*, and thus a breach of the union's duty of fair representation.

In *United Steelworkers of America* v. *Rawson*, 110 S. Ct. 1904, 1913 (1990), the Court held that an "allegation of mere negligence will not state a claim for violation of [the duty of fair representation]." [6] Nothing in *Rawson* suggests that any distinction should be drawn between a union's negligence in failing to perform a so-called mandatory duty (as alleged in this case) and its negligent failure to per-

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[6] *Rawson* was decided on May 14, 1990, one week after the Tenth Circuit's decision in this case. The Tenth Circuit therefore did not have the benefit of the *Rawson* decision in evaluating the Board's "mere negligence" rationale.

form other obligations (such as the contractual obligation at issue in *Rawson*). As the facts here show, in the former case as well as in the latter, the union's failure may be the result of simple negligence that is not properly characterized as arbitrary.

Petitioner's reliance on *Teamsters Warehouse Union, Local 860*, 236 N.L.R.B. 844 (1978), enforced, 652 F.2d 1022 (D.C. Cir. 1981) (Pet. 11-14), is misplaced. That case did not involve any claim of negligent failure to perform a statutorily mandated act. In *Teamsters*, the union knew, but did not inform the unit employees, that their employer would discharge them if their contractual wage demand was successful. The Board found that the union violated its duty of fair representation "by persisting in demanding a wage increase it knew would result in [the employees'] termination." 236 N.L.R.B. at 844 n.2. In the present case, the Union agents did not know that the notice to the mediation service had not been timely filed, nor did they know of the consequences of that omission at the time the strike decision was made. However, they did inform the employees that their jobs were at risk if they struck. Moreover, the Board majority concluded that, after they were apprised of the notice problem, the Union agents did not act irrationally in advising the employees to persevere with the strike, since the Company had already discharged them.[7]

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[7] In a pre-*Rawson* decision, the Ninth Circuit held that negligence may constitute a breach of the duty of fair representation where (1) "the individual interest at stake is strong *and* the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim," and (2) "union negligence [is] the solitary and indivisible cause of the complete extinguishment of an employee's grievance

2. Although we submit that the Board's decision was correct, the Court may decide that, in light of the divergence between the Board's rationale and that adopted by the court of appeals, this case should be held for the decision in *O'Neill*. As we pointed out in our brief at the petition stage in *O'Neill* (at 9-11), there is considerable disarray in the courts of appeals concerning the scope of the duty of fair representation. With regard to the question in this case, for example, the Sixth Circuit shares the view of the Tenth Circuit that the duty of fair representation applies only where "a member or group [is] singled out for different treatment." *NLRB* v. *Local 299, Int'l Bhd. of Teamsters*, 782 F.2d 46, 51 (1986) (Pet. App. 12a). The D.C. Circuit, on the other hand, agrees with the Board that arbitrary action directed at an entire unit may constitute a breach of the duty. *Warehouse Union, Local 860* v. *NLRB*, 652 F.2d 1022, 1025 (D.C. Cir. 1981); and see *Alicea* v. *Suffield Poultry*, 902 F.2d 125, 130 (1st Cir. 1990) (differential treatment not necessary for breach of the duty of fair representation).

Although *O'Neill* does not directly raise the question whether the Tenth Circuit's rationale in this case is correct, it does offer the Court an opportunity to consider the scope of conduct that violates the duty of fair representation because it is "arbi-

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rights." *Eichelberger* v. *NLRB*, 765 F.2d 851, 855 (1985). But, even in those circumstances, the Ninth Circuit recognized that "courts and administrative bodies are not constrained to find a breach, but must carefully weigh the circumstances of each particular case in light of established principles of law." *Ibid.* (explaining *Dutrisac* v. *Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983)). See also *Peterson* v. *Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985).

trary."[8] Thus, the Court's decision in *O'Neill* may well shed light on the rationale of the decision below —that a union's coduct is not "arbitrary" within the meaning of *Vaca* unless it adversely affects only a minority of employees. Accordingly, the Court may wish to defer action on this petition until *O'Neill* has been decided.

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[8] The Court's recent cases concerning the duty of fair representation have generally involved procedural or other issues that do not directly implicate the standard of conduct imposed by the duty. See, *e.g., Chauffeurs, Local No. 391* v. *Terry,* 110 S. Ct. 1339 (1990) (right to jury trial in duty of fair representation case) ; *United Steelworkers of America* v. *Rawson, supra* (pre-emption of state law by duty of fair representation) ; *Breininger* v. *Sheet Metal Workers Int'l Ass'n,* 110 S. Ct. 424, 429-438 (1989) (relationship between unfair labor practice claims and duty of fair representation claim) ; *Communications Workers* v. *Beck,* 487 U.S. 735 (1988) (permissibility of expenditure of union dues for non-representational activities in light of 29 U.S.C. 158(a) (3) ; *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. 151 (1983) (statute of limitations) ; *IBEW* v. *Foust,* 442 U.S. 42 (1979) (availability of punitive damages) ; *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976) (whether suit against employer may be dismissed when corresponding duty of fair representation claim against union has withstood motion for summary judgment). Although the court has necessarily had to consider issues concerning the scope of the duty of fair representation in the course of deciding many of the above cases, the cases have not directly focused on the requisite standard of conduct.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held in abeyance and disposed of in light of the Court's decision in *Air Line Pilots Association International* v. *O'Neill*, No. 89-1493.[9]

Respectfully submitted.

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NOVEMBER 1990

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[9] If the Court ultimately decides to remand the case to the Tenth Circuit in light of the decision in *O'Neill*, we suggest that the Tenth Circuit also be directed to consider the effect of this Court's decision in *United Steelworkers of America* v. *Rawson*, *supra*.

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No. 90-400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

ARGUMENT

Pete Le'Mon ("Le'Mon"), petitioner, herein replies to the Brief for the National Labor Relations Board ("NLRB"),[1] respondent. Before doing so, however, Le'Mon respectfully suggests that it would be useful to the Court to have at hand the Brief for the United States as Amicus Curiae[2] in *Air Line Pilots*

[1]Brief for the National Labor Relations Board ("NLRB Br.").

[2]Herein referred to as the "*O'Neill* Amicus."

Association v. O'Neill.[3] For if certiorari is warranted in *O'Neill* for the reasons stated in the *O'Neill* Amicus, then certiorari is even more justified in the instant case.

The NLRB Brief, as we understand it, makes three points. The first point is that the conduct of officers of the Sheet Metal Workers' International Association Local No. 49 ("SMW")[4] is to be separated from that of its attorneys in determining the SMW's liability for conduct that involved both types of agents.[5] The second NLRB point is that its decision denying relief to Le'Mon is justified on an independent ground, one not ruled upon by the Tenth Circuit.[6] And the third NLRB point is that the independent ground claimed to justify its decision, but not the decision of the Tenth Circuit, warrants remand rather than this Court's full consideration on certiorari.[7]

Le'Mon will demonstrate herein that the NLRB Brief, especially when considered with the *O'Neill* Amicus, actually shows why this case should receive the Court's fullest consideration following receipt of the parties' briefs on the merits.

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[3]*O'Neill v. Air Line Pilots Ass'n*, 886 F.2d 1438 (5th Cir. 1989), *cert. granted*, 59 U.S.L.W. 3243 (U.S. Oct. 1, 1990) (No. 89-1493).

[4]The SMW, as set out more fully in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Le'Mon Petition") at 5-8, is the respondent in charges brought before the NLRB by Le'Mon that led to the Tenth Circuit's decision for which review is here sought.

[5]NLRB Br. at n.2.

[6]*Id.* at 5-6.

[7]*Id.* at n.9.

1. SWA Liability for Agents' Conduct

The NLRB attempts to insulate the SWA from liability for the untoward acts of its agents, acts which caused Le'Mon to be discharged from employment.[8] The Court will recall that the SWA failed to file a timely "§ 8(d) notice"[9] with respect to the strike it intended to conduct against Le'Mon's employer.[10] It cannot be denied that the SWA was the "party" to the agreement with the obligation to file the § 8(d) notice, that the SWA is the respondent in the NLRB proceedings that denied Le'Mon all relief for his discharge,[11] or that the SWA, as a labor organization, is amenable to NLRB charges and appropriate relief for the unlawful acts of its officers as agents.[12] Further, it cannot be denied that the SWA, as a labor organization, is amenable to NLRB charges and appropriate relief for the unlawful acts of its

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[8]*Id.* at n.2.

[9]The term "§ 8(d) notice," found in § 8(d)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d)(3), and which, under § 8(d)(4) of the NLRA, 29 U.S.C. § 158(d)(4), precludes a strike unless proper notice is given, refers to the notice a party wishing to modify a collective bargaining agreement must furnish to the Federal Mediation and Conciliation Service ("FMCS") at least 30 days prior to the expiration of the agreement. No one in this case disputes that the SWA failed to provide timely § 8(d) notice, that this failure resulted in Le'Mon's discharge from employment, and that, because the notice was not given, Le'Mon has no recourse against his employer for the discharge.

[10]The undisputed facts are found in the Le'Mon Petition at 3-5.

[11]See the captions to the proceedings below which appear in the Appendix to the Le'Mon Petition, namely the NLRB Complaint and Notice of Hearing (App. 42a), the NLRB Decision and Order (App. 14a), and the Judgment of the Tenth Circuit (App. 1a).

[12]*See Sheet Metal Workers v. NLRB*, 293 F.2d 141, 149 (D.C. Cir.), *cert. denied*, 368 U.S. 896 (1961).

attorneys as agents.[13] For, "it was undoubtedly the intention of Congress to apply the common law rule with respect to liability for the acts of an agent."[14] The whole thrust of common law agency principles endorsed by Congress would be cast aside by the position expressed by the NLRB Br. at 3 and accompanying text. As we understand that position, the SWA's officers (Messrs. Briggs and Gilliland) did not know that the § 8(d) notice had not timely been filed, but the SWA's attorney (Bloomfield) did know that essential fact. That set of facts does not exculpate the SWA, as the NLRB suggests. For it is not, and cannot be, the rule of the common law of agency for the principal to be exculpated because it does not immediately know what all of its agents know, or that for the principal to be liable, all of its agents must know what all of its other agents know individually. The whole of agency law, as we understand it, is the imputation of liability to the principal because of the acts or knowledge of its agents. The NLRB's position here would reverse that law in the labor law setting where it has previously been universally applied. We know of no basis for such a result, and the NLRB provides no supporting citation.[15]

2. Sufficient Independent Legal Grounds Do Not Support the Decision Below

The NLRB suggests that an independent ground, a finding of "mere negligence," supports the *result* below. In so stating, the NLRB is forced to concede that "the court [below] did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca v. Sipes* [, 386 U.S. 171, 190

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[13]*NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 175 (8th Cir. 1955).

[14]*United Mine Workers v. Meadow Creek Coal Co.*, 263 F.2d 52, 61 (6th Cir. 1959).

[15]Neither the NLRB nor the Tenth Circuit below premised its decision on such a position.

(1967)]."[16] In other words, the NLRB asserts that the SWA's conduct was "mere negligence" and that such negligence is an insufficient ground for holding the SWA liable under the duty of fair representation.

For such a sweeping conclusion,[17] the NLRB refers us to this Court's decision in *Rawson*.[18] However, the NLRB never quotes completely from the applicable language from *Rawson*. That language is: "The courts have *in general* assumed that *mere negligence*, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today."[19] Thus, the NLRB cannot, and does not, cite *Rawson* for a rule of universal application, for on its own terms the rule applies only to the "general case." In addition, the NLRB cannot, and does not, cite *Rawson* for a rule applying where the aggrieved party can show more than "mere negligence." Thus, on its own terms, *Rawson* cannot be cited as providing an independent ground for sustaining the *result* below, even if this Court must reverse the grounds for decision below. For the case Le'Mon presents here is *not* the general garden variety of duty of fair representation violation, and the SWA's conduct was not "mere negligence," but the failure to fulfill the mandatory duty of filing the § 8(d) notice required by statute. There is every reason, then, for this Court to grant the Le'Mon Petition, precisely to consider whether the failure to file an § 8(d) notice is more than the mere negligence

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[16]NLRB Br. at 6.

[17]*Id.* at 7.

[18]*United Steelworkers v. Rawson*, ___ U.S. ___, 110 S. Ct. 1904 (1990) (*"Rawson"*).

[19]*Id.*, ___ U.S. at ___, 110 S. Ct. at 1911 (emphasis added).

found in *Rawson* and thereby a violation of the duty of fair representation."[20]

3. *O'Neill* Amicus

In every respect, the *O'Neill* Amicus supports the granting of the Le'Mon Petition. There the Government concedes two points of significance to this Court's consideration of the issues presented here. First, the Government agrees "that a union can be held to have violated its duty of fair representation in contract negotiations by acting arbitrarily."[21] So put, the question for the Court's consideration here would be whether it is arbitrary (and therefore a violation of the duty of fair representation) for a union to fail to timely file the required § 8(d) notice. Second, the *O'Neill* Amicus concedes that it would be a violation of the duty of fair representation "if it could be shown that the right of the employees was clearly established at the time of the union's decision and if it was also clear at that time that nothing of value was received in exchange."[22] Here, of course, the "right of the employees" to have the § 8(d) notice timely filed is unquestionable, and it is clear that Le'Mon and the other employees received "nothing of value" as a result of the SWA's failure to file that notice. The position of the United States, then, contrary to the NLRB's position here, completely and totally supports both this Court's granting of the Le'Mon Petition and its granting Le'Mon relief on the merits.

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[20]The Le'Mon Petition, of course, urges this Court to hold that the failure to file the required § 8(d) notice is a *per se* violation of the duty of fair representation. It goes without saying that a lesser included question is whether the failure to file the § 8(d) notice is "gross negligence" of such severity as to justify liability outside of the general rule of *Rawson*.

[21]*O'Neill* Amicus at 8.

[22]*Id.* at 11-12.

4. Remand Suggestion

The NLRB makes two proposals for the Court's consideration of this case. Initially, it suggests that this Court "may wish to defer action on this petition until *O'Neill* has been decided."[23] Additionally, the NLRB suggests that, if this case is deferred pending *O'Neill*, "the Tenth Circuit also be directed to consider the effect of this Court's decision in *United Steelworkers of America v. Rawson, supra*."[24]

Neither suggestion has the slightest merit. The NLRB admits that "*O'Neill* does *not* directly address the rationale adopted by the Tenth Circuit in this case . . . ."[25] That is because *O'Neill* addresses the "arbitrary" prong of the duty of fair representation. The instant case, on the other hand, at least as the Tenth Circuit viewed it, does not address that prong at all, but instead turns on the supposed requirement that, in addition to everything else *Vaca* requires, including proof of arbitrary conduct, Le'Mon's case failed because he did not prove the SWA's conduct was "discriminatory."[26] Thus, this Court's resolution of *O'Neill* will not be dispositive of Le'Mon's rights in this case, and a decision in *O'Neill* will provide the Tenth Circuit with no guidance on the proper resolution of the primary issues of concern here.

Reference to *Rawson* has no better foundation. In a more candid moment, the NLRB admits that *Rawson* is among those cases which have "generally involved procedural or other issues

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[23]NLRB Br. at 11.

[24]*Id.* at n.9.

[25]*Id.* at 7-8 (emphasis added).

[26]As noted above, the United States concedes that "the Court [in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953)] surely did not imply that unions should be immune from liability for arbitrary decisions." *O'Neill* Amicus at 8.

that do *not* directly implicate the standard of conduct imposed by the duty [of fair representation]."[27]

CONCLUSION

For the foregoing reasons, Le'Mon urges this Court to grant his petition. Serious and substantial issues are raised by this case which are not presented by *O'Neill*. The instant case provides this Court with a complete and unassailable record through which to consider and decide: 1. What conduct beyond "mere negligence" violates the duty of fair representation, whether or not that conduct reaches the level of a *per se* violation; and, 2. Whether proof of union "discrimination" is a necessary element of a duty of fair representation violation, to be added to those found in *Vaca*, as the Tenth Circuit held. This Court's decision in *O'Neill* will, in all likelihood, leave serious and substantial questions of duty of fair representation law that can and should be answered here.

Ordinarily, we would not make so direct a statement as to how this Court should treat a case being briefed. However, the NLRB has interposed its view that this case should be remanded after *O'Neill*, and in light of *Rawson*.[28] It is Le'Mon's view, and one that holds out considerably more promise for justice and prompt decision on issues of major importance, that the Court should grant his certiorari petition, and schedule arguments of his case and *O'Neill* concurrently. In that way, it is respectfully suggested, the Court can consider, after the fullest briefing and argument on the merits, two significant duty of fair representation

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[27]NLRB Br. at n.8 (emphasis added).

[28]NLRB Br. at n.9.

cases which present serious issues under distinct prongs of the *Vaca* test.[29]

Respectfully submitted,

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November 21, 1990

[29]Should the Court grant certiorari, it may wish to consider whether a brief of the FMCS should be requested, in addition to the Court's receipt of the briefs of the parties in the regular course. This case directly implicates the requirement that § 8(d) notices be submitted to the FMCS, and no attorney for the FMCS is shown on the NLRB Brief in the instant case, nor does that brief state that it reflects the FMCS' views.